

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 244 of 2021

Babla Dolui

Vs.

The State of West Bengal

For the Appellant : Mr. Mainak Bakshi, Adv.

For the State : Ms. Zareen N. Khan, Adv.
Mr. Arup Sarkar, Adv.

Hearing Concluded on : December 20, 2022

Judgement on : January 5, 2023

DEBANGSU BASAK, J.:-

1. Appellant was put on trial on a charge under Section 376 (2) (j) (1) of the Indian Penal Code, 1860. By the impugned judgement of conviction and order of sentence dated March 26, 2021 the appellant was found guilty under Section 376 (2) (j) (1) of the Indian Penal Code, 1860 and sentenced to rigorous imprisonment for a term of 15 years with fine of Rs. 50,000 and in default of payment of fine, to undergo further imprisonment of six months.

2. The mother of the victim lodged a written complaint dated April 19, 2017 with the jurisdictional police station

stating that, she went to the bank for work. She left her handicapped daughter, the victim herein, at home. The appellant took advantage of the victim being alone. When she came back to home, she found the victim lying disrobed and on seeing her, the appellant ran away. The victim was crying. The victim told her that the appellant destroyed her dignity.

3. On the basis of the written complaint dated April 19, 2017, the police registered a First Information Report and started investigations thereon. On completion of the investigations, the police submitted a chargesheet. The court framed charges against the appellant on June 20, 2018 under Section 376 (2) (j) (l) of the Indian Penal Code, 1860. The appellant pleaded not guilty and claimed to be tried.

4. At the trial, the prosecution examined seven witnesses and relied upon various documentary evidences. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code on March 24, 2021 where, the appellant pleaded that he was falsely implicated. He denied the allegations against him.

5. The victim and the de facto complainant, who is the mother of the victim, were informed about the pendency of the appeal and the date of hearing of the appeal by the police on

the direction of the court. The police submitted a report stating that, the victim received the communication by putting the left thumb impression and that, the mother of the victim received the communication by signing thereon. None appeared on behalf of the victim and the de facto complainant at the hearing of the appeal.

6. Learned advocate appearing for the appellant submitted that, the prosecution failed to prove the charge against the appellant beyond reasonable doubt at the trial. He submitted that, there was no evidence of the appellant committing rape on the victim. The evidence with regard to such a charge was at best piecemeal. According to him, there were embellishments and improvements in the testimonies of the prosecution witnesses rendering such testimonies unworthy of reliance.

7. Referring to the evidence on record, learned advocate appearing for the appellant submitted that, the charge of rape was not corroborated by any medical evidence. The victim refused to undertake medical examination. The statement of the victim recorded under Section 164 of the Criminal Procedure Code was not tendered in evidence.

8. According to the learned advocate appearing for the appellant, since the victim was mentally retarded as is evidenced by the medical documents in that regard, the testimony of the victim should not be relied upon without corroborating medical evidence. He referred to the disability certificate of the victim in this regard. In such circumstances, he submitted that, the appellant should be acquitted of the charge.

9. Learned advocate appearing for the State submitted that, the prosecution proved the charge beyond reasonable doubt. He submitted that, the mother of the victim saw the victim in a naked condition and the appellant to flee away from the place of occurrence. She submitted that, the mental condition of the victim and her mother should be taken into account while considering the fact that the victim refused to undergo medical examination. The refusal to undergo medical examination by the victim was adequately explained by the trauma suffered by the victim and the mental condition of the victim and her mother. According to her, refusal to undertake medical examination is not fatal to the case of the prosecution. In such circumstances, she submitted that, the

impugned judgement of conviction and the order of sentence need not be interfered with.

10. As noted above, seven prosecution witnesses were examined at the trial. The mother of the victim was examined as PW1. She was the de facto complainant. She identified the appellant in court. She stated that the victim was her daughter. The victim was physically challenged and to some extent mentally challenged also. She stated that, the incident took place on April 19, 2017 at about 12:30 PM. On that date, she went to the bank for withdrawal of money. She kept the victim in the house of a neighbour. When she returned from home, she called the victim when, the victim replied that she was there. Then she went near the house of the neighbour and saw the victim in a naked condition. The victim came out from the banks of a pond. She also found the appellant there. The victim told her that, the appellant did “nongra kaj” with her. At that time, the appellant cursed her and the victim with thunder striking them. At that time, the nephew of the appellant also reached the spot. She informed the incident to her neighbours. She went to the police station and lodged the complaint. She tendered the written complaint which was marked as Exhibit 1. She stated that, the police took the

victim to court for recording a statement and that she accompanied the victim. The police came to the village, visited the place of occurrence and interrogated her. Police also seized the disability certificate of the victim. She signed the seizure list which was marked as Exhibit 2.

11. In cross-examination, she stated that, when she returned home from the bank, she enquired about the victim from the neighbour under whose care she left the victim to go to the bank. At that time, the neighbour was sweeping her courtyard. On being asked, the neighbour told her that, the victim was somewhere around. She stated that, when she went to the bank, she locked the door of a house and that nobody was inside her house. Since the victim was mentally challenged, she kept the victim under the custody of the next door neighbour when she went to the bank. She stated that, she started screaming and crying when she saw the victim in the naked condition. On hearing her screams, many persons gathered at the spot. She however could not recollect the names of any of the persons gathering at the spot at the time of her cross-examination. She denied the suggestion with regard to a dispute between her and the appellant regarding land as also the suggestion with regard to false implication.

12. The victim deposed as PW 2. The trial court recorded that some questions were put to the victim and that she understood the questions and replied rationally. The victim stated that, PW 1 is her mother. She identified the appellant in court. She stated that, the appellant committed nuisance with her (asavya kaj). She stated that she was not going to school at the time when she was deposing. She stayed with her mother. On the date of the incident, her mother went to the bank and she was alone. The appellant took her to the garden and pressed her mouth with his hand. The appellant opened her pant and did nuisance (asavya) with her. The appellant also pressed her breast. She was taken to the court where she stated about the incident. She was taken to the hospital also.

13. In cross examination she stated that, her mother told her to depose. She stated that, the appellant pressed her mouth by hand. When her mother came, the appellant fled. She denied the suggestion of false implication.

14. The teacher in charge of the school where the victim studied deposed as PW 3. She produced the relevant admission register and stated that the date of birth of the victim noted in the admission register was March 17, 1991.

The relevant portion of the admission register as well as the certified copy of the same was tendered in evidence and marked as Exhibit 3. The defence declined to cross examine her.

15. The doctor who examined the appellant deposed as PW 4. He stated that, he conducted the medical examination of the appellant and prepared a report which was tendered in evidence and marked as Exhibit 4. The defence declined to cross examine him.

16. The elder sister of the victim deposed as PW 5. She stated that, her mother called her on telephone at about 1/1:30 PM. Her mother was crying over the phone. At that time, she was at her matrimonial home. Her mother told her that, the appellant raped the victim. She told her husband. She and her husband went to the house of her mother. There, they saw her mother and the victim. Her mother told her that, the appellant took the victim to a garden near the pond which was surrounded by bamboo. Both her mother and the victim were crying immensely. She stated that, she knew the appellant as a neighbour and could identify him if he was present in court.

17. In cross-examination, she stated that, she heard about the entire incident from her mother and the victim.

18. The investigating officer deposed as PW 6. She stated that, she sent the victim for medical examination. She visited the place of occurrence and prepared the rough sketch map with index. She examined available witnesses and recorded their statement. She seized the physical disability certificate of the victim from the mother of the victim. She tendered the disability certificate which was marked as Exhibit 7. She stated that, the victim was examined under Section 164 of the Criminal Procedure Code.

19. In cross-examination, she denied the suggestion that, she did not visit the place of occurrence or did not get the victim examined under Section 164 of the Criminal Procedure Code. She denied that the investigation report was a result of table work.

20. The police personnel who sent the appellant for medico-legal examination deposed as PW 7. She stated that, she collected the report of such examination. She filed the charge sheet against the appellant on August 29, 2017.

21. In cross-examination, she denied that, she did not investigate the case properly and that she submitted the charge sheet in a perfunctory manner.

22. The appellant was examined under Section 313 of the Criminal Procedure Code. He denied the allegations against him. He claimed himself to be innocent and falsely implicated. He declined to adduce any evidence.

23. At the trial, the prosecution established through the evidence of PW 1 and 2 that, the victim was with the appellant. The victim was found naked. The victim claimed that, the appellant committed “nongra kaj”/ “asovya kaj” with her. The phrases in quotations were spoken in vernacular by the victim. Loosely translated, the phrases mean “dirty work/job”/ “rude job”. The phrases used by the victim were in vernacular Bengali which, she deposed at the trial, would also include rape. However, medical evidence is lacking with regard to rape. The victim denied subjecting herself to medical examination although she was taken to the hospital for such purpose at the relevant time. The evidence produced on behalf of the prosecution does not throw up sufficient material to come to a conclusive conclusion that, the victim was raped. The phrases used by the victim at the time of the deposition to

describe the incident coupled with the lack of medical evidence leaves a margin of doubt which should go to the benefit of the appellant.

24. Lack of corroborating medical evidence in a case of rape is not fatal to the case of the prosecution in the event, the testimony of the victim is accepted by the court to be truthful and inspires confidence in the court. In the facts of the present case, the prosecution could not produce corroborating medical evidence in view of the victim refusing to undergo medical examination although was taken to the hospital for such purpose. One should also take into consideration Exhibit 7 which was the disability certificate of the victim. The victim suffered from physical and mental disability. Therefore, it would be improper to rely on the sole testimony of the victim so as to return a finding of rape as against the appellant without there being some amount of corroborating evidence.

25. However, as noted above, the victim was found naked and in the company of the appellant. The phrases used by the victim in Bengali vernacular to describe the incident established at the basic minimum that her modesty was outraged by the appellant. An issue as to whether the

appellant was guilty of attempting to rape the victim or not also emanated out of the facts established at the trial.

26. It would be profitable to refer to **2004 volume 4 Supreme Court Cases 379 (Aman Kumar and Another Vs. State of Haryana)** with regard to attempt to commit an offence and attempt to commit rape. It held as follows: –

“9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word “attempt” is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary

for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative

of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.”

27. In the facts and circumstances of the present case, the victim was physically and mentally challenged. She was left at her residence by her mother when her mother went out to the bank for work. She was taken out of her residence by the appellant. She was taken to the bank of a pond beyond the eyesight of neighbours. She was disrobed. She was found naked by her mother in the company of the appellant. After the victim and the appellant were discovered in such position, the appellant told her mother in Bengali vernacular that, both the victim and her mother would face grave consequences. Therefore, there was an intention on the part of the appellant established by his conduct of taking the victim out of her residence to a secluded place and disrobing her there, of sexually gratifying himself. He failed short of the actual consummation, at least there is no corroborating evidence to establish actual consummation, upon the calling out of the mother of the victim and the victim responding to such call of her mother. The appellant, in the facts and circumstances of the present case, proceeded to stage of more than preparation with the intention to commit rape but to a stage where, he

actually attempted to commit rape. He was prevented from committing rape on the intervention of the call of the mother of the victim.

28. The appellant was convicted under Section 376 (2) (j) (l) of the Indian Penal Code, 1860 by the trial court. In view of the discussions above, we find that the appellant was guilty of attempting to commit rape of the victim and therefore it would be appropriate to impose a sentence under Section 376 of the Indian Penal Code, 1860 read with Section 511 thereof. We therefore impose a punishment of rigorous imprisonment for ten years upon the appellant taking into consideration the nature of the incident and the mental and physical condition of the victim. We also impose a fine of Rs. 10,000 upon the appellant and in default of payment of the fine; the appellant shall undergo a further imprisonment of six months.

29. In view of the discussions above, we therefore modify the impugned order of sentence as noted in the preceding paragraph.

30. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

- 31.** CRA 244 of 2021 is disposed of accordingly.
- 32.** Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.
- 33.** Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

[DEBANGSU BASAK, J.]

- 34.** I agree.

[MD. SHABBAR RASHIDI, J]