

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
Appellate Side**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 487 of 2006
Gour Das @ Sudeb Das
-Vs-
State of West Bengal**

For the Appellant : Mr. Subir Ganguly
Mr. Aslam Khan

For the State. : Ms. Faria Hossain
Ms. Mamata Jana

Heard on : 06.01.2023, 10.01.2023 & 13.01.2023

Judgment on : 17.03.2023

Ananya Bandyopadhyay, J. :-

1. The instant appeal is filed against the judgment and order of conviction dated 30.06.2006 passed by Additional District & Session Judge, FTC 3, Barrackpore in session trial no. 14(5)05 convicting the appellant under Section 354 of the Indian Penal Code sentencing him to serve rigorous imprisonment for two years and a pay a fine of Rs 10,000/- in default to undergo simple imprisonment for one year more for the offence under Section 354 I.P.C.
2. The prosecution case originated on the basis of a complaint filed by the complainant inter alia stating on 12.10.04 at about 7.30 pm in the evening his sister along with his niece aged about 15 years arrived at his house and disclosed the appellant called the victim at about 6.30 pm in the evening and took her inside the bamboo grove in front of the

house of the victim and raped her after making her lie dorsally on the earth inside the grove. Thereafter the appellant threatened the victim from divulging the incident to anyone. The complainant having heard the incident lodged the complaint against the appellant.

3. Based on the aforesaid complaint, Jagatdal PS Case No. 346/2004 was filed under Section 376 of the Indian Penal Code (I.P.C.). On the completion of the investigation charge sheet was submitted against the appellant on 31.01.2005 under Section 376 Indian Penal Code. Charges were framed against the appellant to which he pleaded not guilty and claimed to be tried.
4. The prosecution in order to establish its case cited 20 witnesses and exhibited certain documents.
5. The Ld. Advocate, Mr. Subir Ganguly for the appellant submitted, though the evidence of the victim is of paramount consideration in a case involving sexual offence, in the instant case the deposition of the victim is unreliable and is at variance to what she stated in her statement recorded u/s 164 Criminal Procedure Code, to her mother and before the Court during her examination. He further stressed upon the fact that the victim was much ahead of her age as she stated that the appellant loved her at a tender age being a student of class 1. At one instance the victim stated the manner in which the appellant committed the rape accomplishing penetration. However before the Court the victim stated the appellant to have touched the vagina and fled. The Ld. Advocate for the appellant further argued that in case of forceful commission of rape there must be resistance on the part of the victim, the wearing apparels must be torn with mud stain thereon if the person

jostled together. The wearing apparels were seized but not produced before the Court. Babu Ghosh, the owner of the bamboo grove was not examined. The rough sketch map did not mention the distance from the point 'a', to the point 'b'. He further contended that the de facto complainant PW1 being a signatory to the seizure list could not remember as to why he signed the seizure list. Moreover, he did not talk to the victim regarding the incident. PW1 did not go through the complaint after it was scribed. PW1 heard about the incident from her sister and was ignorant of the actual name of the appellant. PW9 and PW10 the seizure list witnesses were unaware of the contents of the seizure list as they signed on a blank paper. The extra judicial confession of the appellant before PW11 was not supported by evidence. During medical examination of the victim, PW18 did not find any mark of injury on the person of the victim. PW4, 6 and 7 did not support the prosecution case. The vital witnesses, Dhiren, Goutam and Parimal were not examined. The contents of the FIR were not proved. There was no evidence of last seen together. The appellant had a good reputation in the locality and had been made a scapegoat and victim of circumstances. The prosecution failed to prove its case and accordingly the appeal shall be allowed.

6. The LD. Advocate, Ms. Faria Hossain for the State submitted the sole evidence of the victim is enough to convict a person u/s 376 or section 354 Of the Indian Penal Code. The deviation of the victim cannot be the cause of disregarding her evidence in presence of corroboration from other witnesses. It was further submitted since there was no house in between the place of occurrence and the bamboo bush, the

possibility of somebody to see the appellant and the victim was bleak at that point of time. In village culture generally the elderly male person does not speak about such sensitive issues with young girls. Therefore it is quiet natural and normal that the de facto complainant being an uncle did not discuss the incident with the victim. The date, time and place of occurrence were constant. There must have been an incident for which the victim was taken to the doctor as there cannot be any smoke without fire. Non production of wearing apparels before the Court or examinations of certain witnesses do not affect the prosecution case, as lacuna on the part of the investigating officers does not demolish the prosecution evidence. Moreover the extra judicial confession of the appellant before the doctor which was mentioned in the document marked as exhibit 7 proved the guilt of the appellant and the Ld. Advocate for the State relied upon the decision cited in ***Vinayak Shivajirao Pol Vs. State of Maharashtra, (1998) 2 Supreme Court Cases 233*** in support of her contention and prayed for dismissal of the appeal.

7. Assessing the evidence of the prosecution it reveals P.W. 19 to have been scribed of the complaint marked as EXT. 1/2.
8. P.W 14, P.W. 15, P.W. 16 where the officials of Katadanga North Janata Arya Vidyalaya who deposed the victim to be a student of the aforesaid school and her date of birth recorded in the admission registrar was 15.1.93.
9. P.W.8 examined the victim on 13.10.04 at 10.30 am at Bhatpara State General Hospital. The victim told P.W.8 of being raped by the appellant at Bamboo Bagan Stripara at 6.00 P.M. on 12.10.04. P.W.8 advised

the victim to be examined by gynecologists for expert opinion, radiologists and dental surgeon for determination of age and identifying the document marked as EXT.-5. During her cross examination she stated the injury report did not mention the victim to have divulged the incident of rape to P.W.8. who was not examined by the police. P.W.11 examined the appellant and found him to be sexually potent. P.W.11 deposed that

“On examination I did not find any injury mark over genitalia no foreign body was present in private part, no venereal diseases was seen over private part.

Cause of injury as stated by the patient confessed that he had raped Putul Kujur aged 15 years Hindu female D/O Fagu Kujur on 12.10.04 at 6.30 P.M. at Basbagan near Stirpara, under P.S. Jagatdal, patient also confessed that he had also raped twice before that date. This examination report was written by myself. It bears my signature with date 4.11.04. This examination report is marked as Ext.7.

Ext-7 is the Injury report Attendance Admission in Bhatpara State General Hospital. During examination I did not find any injury mark on the body of Gour Das. Injury report reflects the injury detected on examination of a patient at the Hospital.

In the injury report place of occurrence is depicted on the basis of the statement made by the patient.

In Ext-6 there is mention as to on which points the patient was to be examined.

Patient has mentioned the place of occurrence. In the column place of occurrence there is no mention that the place of occurrence was stated by the patient.

Ext-7 is injury report. In the column the cause of injury the incident which causes injury is mentioned.

The column for the cause of injury is not meant for writing confessional statement.

I know that statement of the patient or of the accused is to be recorded in separate sheet in question and answer form.”

10. PW 13, the radiologist attached to P.N. Bose hospital determined the bone age of the victim ranging from 15 years to 17 years through ossification test as per his report marked exhibit 9. PW 18, the gynecologist examined the victim and identified the report marked as exhibit 15.
11. PW 9 and PW 10 both had been the seizure list witnesses claiming to have signed a blank paper. PW 12 received the complaint from one Birsa Orang who filed the formal FIR marked exhibit 8. PW 17 the concerned Ld. Judicial Magistrate recorded the statement of the victim u/s 164 Cr.P.C. marked as exhibit EXT 3/1. The evidence of PW 1, 2 and 3 her elementary and intrinsic concerning the case. At the instance of PW 1 the maternal uncle of the victim PW 2 and the brother of PW 3 lodged a written complaint which was scribed by PW 19. PW 1 stated that his niece the victim was examined by the police officer and she lodged a G.D. Thereafter she was asked to submit a written complaint. PW 1 stated PW 3 had told him that the modesty of the victim was outraged by Goutam Das who raped her. Contrary

to the contention of PW 19, PW 1 stated that complaint was written as per dictation of police officer and he, *“did not go through the complaint after it was scribed* “in contradiction to his statement in the written complaint dated 12.10.2004 as, *“after the entire incident was being read over and explained to me I put my signature at the end of the complaint.”* PW 1 further stated that he did not notice any injury on the victim when she arrived at his house accompanied by her mother. PW 1 heard the incident from PW3 and did not witness the same. PW 2 the victim deposed to have been lifted from the Courtyard to the bamboo grove by the appellant who reclined her on the ground and fell on her body. The appellant thereafter touched her vagina with his hand, removing her pant and fled. PW 2 narrated the incident to her mother on returning home who took her to the local police station. The incident was reported to the police station and PW 2 was subsequently taken to the Bhatpara general hospital. After few days of the incident she was taken to D. N. Bose hospital. Police visited their house and also the place where the victim was taken by the appellant. She identified her signature collectively marked as exhibit 3. She further identified her signature on the seizure list in connection with seizure of her wearing apparels by the police marked exhibit 2/1. She stated that *“police did not make any writing at the time of seizure of the wearing apparels”*. The said wearing apparels were not produced before the Court.

12. During her cross examination PW2 deposed,

“The distance between my house and the bamboo grove is about 10-15 minutes’ walks. There are street lights by the side of the road passing through our para.

There is no house between our house and the bamboo grove. There is no house near that bamboo grove. There are houses near our house.

I did not sustain any external injury due to lying on the ground as it was only the earth. I return home straight from the bamboo grove on being escaped from the hands of the accused.

In course of returning from bamboo grove to my house I did not tell the incident anybody or raise any cry.

When I reported the incident my mother, my elder sister and my brother and my father were present in our house.

On hearing the incident from me, my parents, my elder sister, elder brother went to the house of Gour Das but they did not go to the P.O.

That bamboo grove is a big area. I reported the incident to the neighbours.”

13. PW 2 further stated to have reported the incident to the head of their para namely Dhiren and also to Goutam, Parimal at about 8 pm.

14. PW2 further deposed at the P.S., she was examined by the police and she lodged a G.D. Subsequent to the incident police never came to their house. However during her examination in chief PW 2 stated police to have come to their house and the place of occurrence was shown to the police by the victim. She further stated that her father, her elder brother and her elder sister were not examined by the police.

PW 2 could not remember the time and place concerning her signature on the seizure list marked exhibit 2/4. There are inconsistencies in the evidence of PW 2 with regard to the visit of the police at her house, the lodging of G.D. and the seizure of the wearing apparels as per the seizure list. PW 20 the investigating officer stated during his investigation he did not find any G. D. entry lodged by the victim girl. Seized wearing apparels of the victim were not found in the Court and he did not examine any person named Dhiren, Goutam or Parimal. PW 9 and 10 Bapi Nath and Punai Orang respectively during their evidence stated on being asked by the police they put their signature on the paper on 12.10.04. Both PW 9 and 10 were not declared hostile by the prosecution. They further testified to have signed on blank paper. PW 3, the mother of the victim stated that her daughter was lifted by the appellant clasping her mouth by his hands and took her to the bamboo grove. Subsequently the victim reported to her the manner in which the appellant had taken her to the bamboo grove and subjected her to penetrative sexual offence removing her pant. Thereafter along with her elder brother PW 1 and PW 2 she went to Jagatdal P.S. having narrated the incident to PW 1. PW 3 further deposed,

“My daughter was examined by doctor at Bhatpara hospital.

At that time police officer came to hospital. We again came to P.S. We were asked to attend to B.N. Bose hospital at Barrackpore later on.

Accordingly we attended B.N. Bose hospital. I along with my daughter appeared in Barrackpore Court previously. My elder

brother with us at that time. I cannot remember as to what happened after coming to Court on that date.

At the relevant time, my daughter was wearing blue coloured genji and the printed midy of different colour and a pant of blue colour.

Police took the wearing apparels of my daughter and took the same to the hospital.”

15. PW 4 was declared hostile by the prosecution who during his cross examination stated to have known the appellant since his childhood to be a good boy devoid of ill- reputation. The evidence of PW 5 is based on hearsay. PW 6 was declared hostile by the prosecution further stating the appellant as a good boy without ill- reputation to have been known to him since his childhood. PW 7 deposed on the basis of hearsay that the victim was caught in bamboo garden by some boys. During his cross examination he conceded with PW4 and PW 6 that the appellant had been a good boy without any ill- reputation in the locality. PW 7 was not declared hostile by the prosecution.

16. PW 2 in the statement recorded u/s 164 Cr.P.C stated to have been acquainted with the appellant and had companied him to the bamboo grove. She described the manner in which the appellant committed penetrative sexual offence upon her. The age of the victim determined on the ossification test at the time of the incident appears to be within 15-17 years. The medical examination report described her to be a fully grown up girl though still a minor. However her observation and narrative style depicts her to be a diligent person with basic understanding and reasoning. PW 3, the mother of the victim testified

similar version of narrative as described by PW 2 in her statement recorder u/s 164 of CrPC. However PW 2 retracted from her statement recorded u/s 164 of CrPC and as diverged to her mother before the Court. The incident of penetrative sexual assault was replaced by the incident of touching her vagina. The doctors who examined her did not find any external or internal injury on her body immediately after the incident was caused to her. The appellant in his examination recorded u/s 313 Cr.P.C stated to have known the victim. The sole evidence of the prosecutrix is believable if it is found to be credible and trustworthy.

17. In the instant case the time taken to traverse the distance between the house of PW 2 and the bamboo grove was 10-15 minutes'. It would have been impossible for any person to lift and drag another person continuously for 10-15 minutes' in street light without being detected by any passerby in view of the statement of PW 2. She did not state to have been prevented from raising an alarm at the time of commission of the offence of rape. The extra judicial confession of the appellant before PW-11, Dr. Bhaha Ranjan Sikdar, who is an independent witness not related to either of the parties is controverted by the evidence of the victim negating the possibility of penetrating sexual intercourse. The evidence of PW 2 in view of her deviation and/or retraction from her statement u/s 164 Cr.P.C do not render her testimony to be infallible.
16. Under the facts and circumstances of the case in absence of prove of commission of the offence by the appellant beyond reasonable doubt.

The prosecution has failed to prove its case and accordingly the appeal is allowed.

17. The appellant is 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.
18. CRA 487 of 2006 is disposed of accordingly.
19. Lower Court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.
20. 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.)