

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 588 of 2004

Sk. Fakir Ali

-Vs-

The State of West Bengal

For the Appellant : Mr. Y. Mondal

For the State : Mr. Madhusudan Sur,
Mr. Mirza Firoj Ahmed Begg

Heard on : 08.08.2023, 29.08.2023, 11.12.2023.

Judgment on : 12.12.2023

Ananya Bandyopadhyay, J.:-

1. This instant criminal appeal is directed against a judgment dated 28.07.2004 passed by the Court of the Learned Additional Sessions Judge, Fast Track Court No. 2, Barasat, 24-Parganas (North) in Sessions Trial No. 7(4) of 2004 convicting the appellant and sentencing him to suffer rigorous imprisonment for a period of 7 years as well as a fine of Rs. 1,000/- in default, to suffer rigorous imprisonment for 3 months for the offence punishable under Section 376 of the Indian Penal Code.
2. The prosecution case originated on the basis of the complaint which inter alia stated one Smt. Jharna Das aged about 30 years (as stated in the FIR), wife of Dulal Das, Village- Barwaritala, Samar De Sarani, Kestopur, P.S.-

Rajarhat, District- 24-Parganas (North), alleged, on 24.07.2000 she along with her 7 years old son Sumit went to her father's house at Machlandpur, at about 3 p.m. On the next day, on 25.07.2000 at 3.30 a.m. in the morning when she was boarding the first train from Machlandpur, her son became ill. As the train crossed Ashokenagar Station one man previously known to her (resident of Khosdelpur) sat behind her. She dealt in rice and in the same market where they saw the man had a shop. The man wanted to take the child from her. She refused to oblige. In the meantime, the train stopped before reaching the station. Right then, the man took grabbed the child from her and jumped from the train. He started running with her child. She also jumped from the train and followed him shouting at him. The man took her child to a low land with water and threw her child into the mud. When she tried to pick up the child, he forced her into the water. On her request, he brought her son to plain land and took her to a little room and kept her son standing at a little distance away and raped her against her will removing her dress. Then the man went away asking her not to disclose anyone about it. She came with her child to the main road and reached her house at Kestopur by Bus No. 225 at about 6.30 a.m. When her husband returned home at noon, she informed him of everything. She could not come to the police station as she was unwell. On enquiry she came to know that the man's name was Sk. Fakir Ali, resident of Khosdelpur at 22.45 hrs. on 28.07.2000.

3. Based on the aforesaid complaint, the Habra Police Station Case No. 307 dated 28.07.2000 under Section 376 of the Indian Penal Code was initiated against the present appellant. On the completion of investigation charge-

sheet was filed. Charges were framed to which the appellant pleaded not guilty and claimed to be tried.

4. The victim was medically examined on 01.08.2000 at 12.15 p.m. by the Medical Officer Mr. M.K. Sarkar and no marks of injury were found on her private parts, no foreign particles were recovered from her private parts and the doctor of the Government Hospital opined that it was difficult to ascertain whether the victim had been raped or not and the accused/appellant on being medically examined no injuries were found on his private parts.
5. The son of the victim stated before the Learned Magistrate that the accused opened his shirt and pant as well as the saree and garment of her mother and thereafter, he went away after some time which shows the height of imagination and serious discrepancy with the version of 164 statement of his mother.
6. CS No. 378 dated 30.11.2000 was submitted against the appellant on 30.11.2000 before the Learned Court below and the appellant was in detention since his arrest and production on 29.07.2000 and in the C.S. a list of prosecution witnesses was shown but when the trial started on framing of charge on 07.04.2004 astonishingly 8 prosecution witnesses were examined and the medical officers were not examined and the judgment of conviction of appellant was pronounced in an undue haste on 28.07.2000 by the court of the Learned Additional Sessions Judge, Fast Track Court 2.
7. Heard the submissions of the Learned Advocate for the appellants as well as the State. Assessed the evidence of the prosecution witness.

8. The ingredients of offence under Section 376 as defined in Section 375 of the Indian Penal Code were not proved in the instant case.
9. For a conviction under Section 376 of the Indian Penal Code, following ingredients must exist.
 - a. Offence of rape
 - b. Upon the victim lady
 - c. By the accused
 - d. At the place of occurrence in the alleged manner, alleged time need to be proved and since no medical evidence of doctor S.K. Sarkar and Dr. H.S. Sanyal (who examined the victim lady) was taken the medical report of the victim (Ext.-7) could never be said to have been proved and since according to 114A of Indian Evidence Act, 1972 before raising the rebuttable presumption in a graver case medical proof of the fact of sexual intercourse by the accused needs be proved and since in the instant case which is not covered under Section 114A, it was absent, the appellant is liable to be acquitted from this frivolous case.
10. During the trial, the Learned Judge failed to observe the requirements of Section 165 of the Indian Evidence Act, 1872 inasmuch as, in order to discover or obtain proper proof of relevant facts, did not ask any question, in any form, at any time, nor did he order the production of any document or thing viz, here the garments of PW-1, 2 and the appellant and this has caused serious prejudice to the appellant who has been declared guilty without exhausting the legal course properly.

11. In terms of Section 157 of the Indian Evidence Act, 1872, in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when it took place, or before any authority legally competent to investigate the fact, could be proved and in the instant case the testimonies of the prosecution witnesses before the Investigating Officer as well as the Magistrate regarding the same fact, at or about the time when it took place, were not proved which were a must to corroborate their testimonies contained in the depositions given before the trial judge.
12. The evidence of prosecution witnesses as well as the victim lady (PW-1) and her son (PW-2) were full of contradictions and inconsistencies.
13. The doctors were not examined to prove medical reports though they were in the list of prosecution witnesses.
14. There were certain improbabilities in the evidence of the victim lady and the other prosecution witnesses:-
 - a. Not tickets could be produced by the victim girl to prove their presence in the train compartment on that alleged date and time.
 - b. No place of occurrence was identified by the victim or her son (PW-1 & 2) and there was no reason contained in the evidence of PW-8 as to how he could identify the place of occurrence when the victim herself did not point it out, and when they could not even say as to which side of the rail line it occurred.

- c. PW-1 did not receive any injuries and did household works properly but did not go to Police Station instantly.
- d. At the alleged place of occurrence, no bus no. 225 was available, and the victim never described as to the way through which she reached the bus stand (name not mentioned).
- e. No wearing apparels of the victim girl or her son or the accused were seized.
- f. The train driver of that alleged train or railway officials were not examined to verify the truth as to the stopping of train before Guma on that day.
- g. The victim and her husband had previous enmities with the appellant who were in touch with one Botu Mukherjee who was trying to evict the appellant from his shop by hook or by crook.
- h. Even at that early hours of the morning if a lady screams for help and jumps behind a man running with her child, at least some people out 25 passengers in the compartment, must see them and try to stop them from one compartment or other but no such independent train passenger was examined to prove the case.
- i. It is impossible for a man with a child or a lady to jump from 7-8 feet high foot board of a train, standing outside platform and run instantly.

j. If the place of occurrence was only 250 meters away from rail line, the place of occurrence must have been seen from the rail line and train passengers could have come down to save the lady.

k. The charge never specified as to whether the alleged intercourse was against her will or with her consent obtained putting her or her child in fear of death or hurt and in the instant case no benefit of Section 114A was available to the victim girl and even in a case of Section 114A I.E. Act, intercourse by the accused needs to be medically proved.

l. None of the prosecution witnesses could prove the incident as alleged.

15. In the case of **Rai Sandeep alias Deepu Vs. State (NCT of Delhi)**¹, the Hon'ble Supreme Court held as follows:

“22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber 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 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 correlation with each and everyone of other supporting material such as

¹ (2012) 8 SCC 21

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 similar such tests to be applied, it can 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."

16. In the case of **Madan Lal Vs. State of J&K**², the Hon'ble Supreme Court held as follows:

"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 I.P.C. and not an attempt to commit rape under Section 376 read with 511 I.P.C."

17. In the case of **Santosh Prasad alias Santosh Kumar Vs. State of Bihar**³, the Hon'ble Supreme Court observed as follows:

"12. Reference has been made in Gurmit Singh case 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

² (1997) 7 SCC 677

³ (2020) 3 SCC 443

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.

In the case of Krishna Kumar Malik v. State of Haryana, it is observed and held by this Court that 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.”

18. In the case of **Raju and Ors. vs. State of M.P.**⁴, the Hon’ble Supreme Court observed as follows:

“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.”

⁴ (2008) 15 SCC 133

19. The evidence of the prosecution witnesses including the victim lady cannot be relied upon in view of the absurdities and inconsistencies.
20. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
21. In view of the above discussions, the judgment dated 28.07.2004 passed by the Court of the Learned Additional Sessions Judge, Fast Track Court No. 2, Barasat, 24-Parganas (North) in Sessions Trial No. 7(4) of 2004 convicting the appellant and sentencing him to suffer rigorous imprisonment for a period of 7 years as well as a fine of Rs. 1,000/- in default, to suffer rigorous imprisonment for 3 months for the offence punishable under Section 376 of the Indian Penal Code is set aside.
22. Accordingly, the instant criminal appeal being CRA 558 of 2004 stands disposed of.
23. There is no order as to cost.
24. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
25. 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.)