

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

CRA 318 of 2021

Sadhan Barman..... Appellant

Versus

The State of West Bengal

For the appellant : Mr. Kaushik Chowdhury, Adv.

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

Hearing concluded on : April 28, 2023

Judgment on : July 14, 2023

Md. Shabbar Rashidi, J.

1. The appeal is directed against the judgment dated December 9, 2019 and order of sentence dated December 10, 2019 passed by learned Sessions Judge, Balurghat in

connection with Sessions Trial No. 10/2018 arising out of Sessions Case No. 04/2018.

2. By the impugned judgment of conviction and order of sentence, the appellant was convicted for the offence punishable under Section 448/376/511 of the Indian Penal Code. He was sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs.10, 000/- and in default of payment of fine to suffer Rigorous imprisonment for a further period of 6 (Six) months for the offence punishable under Section 376/511 of the Indian Penal Code. The appellant was also sentenced to undergo Rigorous Imprisonment of for 01 (One) year and to pay a fine of Rs.1,000/- and in default to suffer Rigorous Imprisonment of 01 (One) month for the offence punishable under Section 448 of the Indian Penal Code.

3. The victim lodged a written complaint with the officer in charge of Tapan police station stating inter alia that she was a housewife and used to reside in her house with two children. Her husband was away at Bangalore

for avocation. On November 4, 2016 at about 9:30 PM, she was alone at her house, her children having gone to their paternal uncles house. At that time, the appellant entered into her room with an intention to commit rape upon her. The appellant called her, pulled out her wearing apparel, and started touching her private parts. He also tried to commit rape upon her. The appellant also inflicted brutal physical torture upon the victim. The victim called her neighbors for help. When the neighbors of the appellant namely Jayan Mahali and his wife came calling the victim whereupon, the appellant fled away.

4. Based on such written complaint, Tapan Police Station Case No. 357/16 dated November 5, 2016 under Section 448/376/511 of the Indian Penal Code, was started against the appellant. The police took up investigation and on completion of investigation submitted charge sheet under the aforesaid Section of the Indian Penal Code. Accordingly, charges under Section 448/376/511 of the Indian Penal Code were

framed against the appellant on February 12, 2018. The appellant pleaded not guilty to the charges and claimed to be tried.

5. In order to bring home the charges leveled against the appellant, the prosecution examined 11 witnesses in all. In addition, the prosecution also relied upon certain documentary and material evidences.
6. Learned advocate for the appellant submitted that the prosecution has not been able to bring home the charges leveled against the appellant with the help of cogent and convincing evidence. The learned advocate has also submitted there are contradictions in the evidence on behalf of the prosecution and for such contradictions, appellant is entitled to be acquitted.
7. Learned advocate also submits that there are no eyewitnesses to the incident. Referring to the evidence of PW4 and PW5, it has been submitted that the aforesaid witnesses have claimed to be eyewitnesses, however, the aforesaid witnesses are relatives of the victim and as

such they are highly interested witnesses. The conviction based on such evidence is not at all sustainable.

8. On the other hand, learned advocate For the State submits that the prosecution witnesses including the victim herself has fully supported the case of the prosecution. It was contended on behalf of the State that the prosecution witnesses have testified the details of the incident as narrated in the First Information Report. It has also been submitted that the prosecution witnesses are the neighbors of the victim and they arrived at the place of occurrence after hearing alarm from the victim.

9. Learned advocate for the State has contended that the learned court was quite justified in holding the appellant guilty of the offences charged and in convicting him. The judgment of conviction is based on cogent and convincing evidence on behalf of the prosecution and as such, the same does not warrant any interference. The impugned judgment of conviction is deserves to be upheld.

10. As noted, in order to prove the charges, the prosecution examined 11 witnesses besides the documentary and material evidences.

11. The victim herself deposed as PW 1. She has stated that she used to reside in her house with her two sons aged 9 years and 7 years respectively. The occurrence took place about one and a half year prior to the date of the deposition (on May 7, 2018). She further stated that on the relevant date at about 9 PM her two sons were not in the house since they had gone to their maternal uncle's house. Her husband was also away at Bangalore for the purpose of his avocation. At the relevant time, she was preparing her bed. At that time, the appellant entered into her house, dragged her and tried to commit rape upon her. He also applied force, being resisted by the victim. In the process, her bed was shattered. The appellant tried his best to undress the victim, pressed her breasts and tried forceful cohabitation. PW 1 also stated that she went on resisting and was crying for help

but since her throat was gagged and the appellant with his hand pressed her mouth, she could only moan and groan.

12. PW1 further stated that being attracted by her moaning and groaning, her next-door neighbors, PW5 and his wife came there and called her, whereupon the appellant fled away. Later, the victim narrated the incident to them. Thereafter, other villagers were also informed by the victim.

13. On the following day, she lodged a complaint with the Officer-in-charge of Tapan Police Station scribed by her lawyer. PW1 proved her signature on the written complaint, which was marked as Exhibit 1/1. She further stated that the police came to investigate the case on the following day. She refused her medical examination. She was interrogated by the police and her wearing apparels were seized on November 6, 2016 under a seizure list. PW1 proved her signature on such seizure

list (Exhibit 2/1) and the wearing apparels were marked as Mat Exhibit I. She identified the appellant in court.

14. In her cross-examination, PW1 admitted that the appellant was known to her as a co villager. She also stated that PW5 and PW6 were the nephew and nephew's wife of her husband. She however, denied suggestions to the effect that she deposed falsely.

15. The scribe of the written complaint deposed as PW2. He stated that he scribed the written complaint as per narrations of the victim lady. It was read over and explained to the victim and she put her signature on it. PW2 tendered the written complaint which was marked as Exhibit 1/2. He however, stated in his cross-examination that he had no personal knowledge about the incident.

16. A co-villager deposed as PW3. She stated that on the date of incident at about 9.30 PM she heard hue and cry from the house of the victim. She rushed to her house and found PW5 and PW6 pouring water on the victim

who was unconscious. She was moaning being hurt. She further stated that on the date of incident, both sons of victim were at her paternal uncle's house and her husband was at Bangalore. The victim was alone in the house.

17. She also stated that later on, she was informed by the victim that she was preparing bed when the appellant caught her from behind and tried to commit rape upon her. The victim resisted and sustained injuries in the incident. She was also informed that the appellant had pressed her breast and torn her blouse and 'saree', which she was wearing at the relevant time. She identified the appellant in court.

18. In her cross-examination, PW3 stated that she knew the appellant from before as a man of her locality. She stated about the incident for the first time in court. She further stated that when she went to the house of victim, she saw some persons there but she could not give their

details. She did not see the appellant entering or leaving the house of the appellant.

- 19.** A neighbor of the victim, was examined as PW4. He stated that about one and a half years ago, at about 9.30 PM, when he was watching TV at his house, heard hue and cry from the house of the victim. He went there and found some persons pouring water on the victim while she was moaning. Later on, he was informed by the victim that while she was preparing her bed, the appellant came into her house and caught her from behind, removed her Saree, torn away her blouse and pressed her breast and other private parts. PW4 was, further informed that the appellant wanted to throw her on bed with an intention to commit rape upon her by gagging her throat and mouth. The victim sustained injuries in the process. An oral information was lodged with Tapan Police Station in the night of the incident itself and on the following day a written complaint was lodged. He further stated that the two sons of the victim

were at her maternal uncle's house on the date of incident whereas her husband was in Bangalore. PW4 stated that he knew the appellant as a man from adjoining village and identified the appellant in court.

20. In his cross-examination, PW4 stated that when he went to the house of the victim, he had seen his brother PW5 and his wife, as well as his aunt PW3. He had given the topography of the locality. He also stated that he had a talk with the husband of the victim after 15 days of the occurrence when he had returned from Bangalore after the incident.

21. Another neighbor of the victim deposed as PW5. He has stated that on the date of incident at about 8.30 PM his wife and daughter were at the house of victim talking to her. He called them for dinner. After dinner when they were going to bed, they heard the victim calling his daughter. Coming out of the house, PW5 saw the appellant fleeing away from the house of victim. Going into the house, PW5 found the victim lying unconscious

in the courtyard. Wife of PW5 poured water on her face. When the victim regained senses, she disclosed that the appellant entered into her house and tried to commit rape upon her. He further stated that the victim was alone in her house. Her two sons were with the father of the victim in another village and her husband was in Bangalore. He identified the appellant in court.

22. In his cross-examination, PW5 admitted that the victim was his maternal aunt. He further stated the husband of the victim came back after about one month of the incident. He denied knowledge that the victim had strained relations with her husband and used to reside at her father's house and that on the date of deposition, PW5 had come to court with the appellant. Instantly thereafter, PW5 denied a suggestion to the effect that the victim did not reside at her husband's house and used to reside at her father's house.

23. Wife of PW5 deposed as PW6. She also stated that on the date of incident she along with her daughter was

talking to the victim at her house. Thereafter, they came back and had dinner. When she was going to bed, she heard the victim calling her daughter. PW6 and her husband went to the house of the victim and while going they saw the appellant fleeing from the house of the victim. They found the victim unconscious and sprinkled water on her face. After regaining senses, the victim told PW5 and PW6 that the appellant had entered into her house and tried to commit rape upon her. PW6 also identified the appellant in court.

24. In her cross examination, PW6 stated that she knew the appellant as a man of her locality. She further admitted that the victim had disputes with her husband for which her husband was arrested. She also admitted that for such disputes with her husband, the victim used to reside at her father's house.

25. The nephew of the victim deposed as PW7. He is a hearsay witness. He heard that the appellant tried to commit rape upon the victim at about 9.30 PM. He

further stated that the police seized wearing apparels of the victim under a seizure list and he signed on the seizure list, which he identified (Exhibit 2/2). PW7 also identified the seized articles. In cross-examination, PW7 could not name the source from whom he heard about the incident.

26. Another witness to the seizure list deposed as PW8. He had no knowledge of the incident. He was merely a witness to the seizure list through which the saree, petty coat and blouse of the victim was seized upon which he put his left thumb impression. He was also not interrogated by the police.

27. The recording officer deposed as PW9. He stated that on November 5, 2016 he received a written complaint at Tapan Police Station and started Tapan Police Station Case No. 357/16 dated November 5, 2016 under Sections 448/376/511 of the Indian Penal Code. He proved his endorsement of receipt on the written complaint, which was marked as Exhibit 1/3. He also

filled up the Formal First Information Report, which he tendered in evidence and was marked as Exhibit 3.

28. The doctor who attended the victim was examined as PW10. He has stated that the victim was produced before him for medical examination by the police in connection with Tapan PS Case No. 357/2016. However, the victim refused to undergo medical examination. PW10 tendered a report prepared by him in this regard, which was marked as Exhibit 4. The defense declined to cross-examine the witness.

29. The Investigating Officer deposed as PW11. He stated that the officer-in-charge of Tapan Police Station endorsed him the investigation of Tapan PS Case No. 357/2016. In course of investigation, he went through the complaint, visited the place of occurrence, examined available witnesses. He has tendered the rough sketch map with its index of the place of occurrence, which was marked as Exhibit 5. He also sent the victim for her medical examination and collected the injury report,

arrested the accused and forwarded him to court. On completion of investigation, he submitted charge sheet in the case against the appellant. He further stated that he also seized the wearing apparel of the victim under a seizure list, which he tendered in evidence (Exhibit 2).

30. In his cross-examination, PW11 stated that he did not interrogate the neighbors of the victim as none was available. He also did not record the statement of the husband of the victim.

31. On completion of the evidence on behalf of the prosecution, the appellant was examined under Section 313 of the Code of Criminal Procedure. The appellant pleaded innocence having committed no offence at all. He claimed to have been falsely implicated in the case. The appellant, however, declined to adduce any defense witness.

32. From the evidence led by the prosecution it transpires that the appellant is alleged to have attempted rape upon the victim when she was alone at her house. It

is the allegation that the appellant entered into the house of the victim while she was preparing her bed at about 9.30 PM. She was then alone at her house. Her two children who usually resided with her were, on the relevant date, away at her maternal uncle's house. The appellant after so entering into the house of the victim, caught her from behind, gagged her and pressed her mouth. He also removed the wearing apparel of the victim, tore away her blouse, pressed her breast and private parts and tried to commit rape upon her. However, for the intervention of some neighbors, he could not succeed and fled away.

- 33.** Ostensibly, there are no eyewitnesses to the incident except some post occurrence witnesses. PW5 and PW6 are the witnesses who first responded to the calls of the victim. According to the testimony of PW1, the appellant gagged her and pressed her mouth, which incapacitated her from raising alarm. However, PW5 and PW6 both have stated that they heard the victim calling

her daughter's name and rushed to the house of the victim. Such statement on the part of PW5 & PW6 seems to be contradictory to that of PW1. PW6 and her daughter are said to be in the house of the victim just prior to the incident when they were called by PW5 for taking dinner. The said daughter of PW5 and PW6 have not been examined as a witness in this case.

- 34.** Moreover, PW5 & PW6 did not disclose in their examination-in-chief, that they were related to the victim. However, in cross-examination, PW5 admitted that the victim was his maternal aunt. PW4 is the brother of PW5 and related to the victim. Not only that, PW5 denied his knowledge to the fact that the victim had strained relations with her husband but PW6, in her cross-examination, admitted that the victim had disputes with her husband who was arrested for such disputes. She also admitted that due to strained relations with her husband, the victim used to reside at her father's house. If that be so, the case of the prosecution that the children

of the victim were at her father's house on the relevant date and time, seems to be shaken and untrue. The prosecution also did not care to examine the father or the children of the victim who were then aged about 9 years and 7 years, respectively, in order to establish that the children of the victim were actually at her maternal uncle's house on the relevant date.

- 35.** The conduct of PW5 in not disclosing his relation with the victim, in his examination-in-chief, as also, his statements denying his knowledge to the effect that the victim had strained relations with her husband and she used to reside at her father's house for such disputes renders his testimony unreliable. Similarly, the statement of PW6 with regard to victim calling her daughter's name at the time of incident in the wake of her admission in cross-examination that the victim had strained relations with her husband and she used to reside at her father's house due to such disputes loses its credibility.

36. Furthermore, it is the case of the prosecution that the appellant caught hold of the victim from behind, gagged her, pressed her mouth, violated her private parts and tried to throw her down to the bed with an intention to commit rape upon her. In the process, he also removed her wearing apparel and torn her blouse. The appellant allegedly applied force against the victim in order to overpower her. PW4 has categorically stated that the victim sustained injuries when the appellant tried to overpower her. PW3 has also stated that when she visited the house of the victim just after the alleged incident, she saw PW5 and PW6 pouring water on the victim. The victim was then moaning in pain out of the injuries sustained in the incident. Despite, the victim refused to undergo medical examination before PW10. It is understandable that the appellant could only make a futile attempt to commit rape devoid of actual rape. But, the attempts to overpower must have left some

cryptogram which could be revealed in the medical examination.

37. There appear material contradictions in the testimonies of the prosecution witnesses. The victim, PW,1 in her cross-examination denied a suggestion that her husband left her company and went away for the victim dealing in illegal liquor however, PW6 admitted that the victim was leaving at her father's house owing to disputes with her husband. PW4 stated in his cross-examination that he had a talk with the husband of the victim after 15 days of the incident when he returned from Bengalore, whereas, PW5 stated that the husband of the victim returned from Bengalore after about a month of the occurrence.

38. There appears reasonable uncertainty with regard to the place of occurrence. According to PW1 she used to reside in a residence with her two children, her husband having gone to Bengalore for avocation and the occurrence, according to her, took place in such house.

On the other hand, the evidence on reveals that at the material point of time, the victim was estranged from her husband and used to reside at her father's house. Going by the statement of the victim, PW1, as well as other witnesses, the two children of the victim had gone to their maternal uncle's house, on the relevant date. If the victim was residing at her father's house itself, no question of her children going to her father's house does arise. We have already noted that the prosecution did, not examine the children and father of the victim.

- 39.** The investigating officer, PW11 has stated in his cross-examination that he did not interrogate the next-door neighbors of the victim in connection with the case, as they were not available. He also did not record the statement of victim's husband. The appellant happens to be a resident of adjoining village, nevertheless, he has been identified by some of the prosecution witnesses as a co-villager. In his cross-examination, PW5 denied his knowledge that on the date of his deposition, the

appellant, was accompanied by the husband of the victim to court. Therefore, considering the partisan nature of the prosecution witnesses especially PW4, PW5 and PW6, we are of the opinion that a conviction cannot be sustained based on the testimony of highly interested witnesses.

40. In the light of discussions made hereinbefore, we are of the opinion that the prosecution has not been able to bring home the charges leveled against the appellant with the help of convincing evidence. For the aforesaid reasons, the impugned judgment is liable to be set aside.

41. Accordingly, the present appeal being **CRA 318 of 2021**, is hereby allowed. The impugned judgment of conviction dated December 09, 2019 and Order of Sentence dated December 10, 2019 passed by the Learned Additional Sessions Judge, Dakshin Dinajpur, Balurghat in Sessions Trial No. 10 /2018 are hereby set aside.

42. The appellant be, set at liberty forthwith, if not wanted in any other case subject to furnishing a bond to the satisfaction of Learned Additional Sessions Judge, Dakshin Dinajpur, Balurghat, which shall remain in force for a period of six months in terms of the provisions under section 437A of the Code of Criminal Procedure.

43. Copy of the judgment along with Trial Court Records be sent down to the appropriate court at once for necessary compliance.

44. Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying all necessary legal formalities.

[MD. SHABBAR RASHIDI, J.]

45. I agree.

[DEBANGSU BASAK, J.]