

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 369 of 2000

**Mostafa Sk & Another
-Vs-
State of West Bengal**

For the Appellant : Mr. Pradip Kumar Chatterjee

For the State : Mr. Avishek Sinha

Heard on : 21.11.2022

Judgment on : 05.01.2023

Ananya Bandyopadhyay, J. :-

This appeal is preferred against the judgment and order of conviction dated 11.08.2000 passed by Additional Sessions Judge, Berhampore is Sessions Trial No. 02/September, 1999 arising out of Sessions Case No. 21/98 convicting the appellants under Section 376/511 of the Indian Penal Code sentencing them to suffer rigorous imprisonment for one year and to pay a fine of Rs. 1000/- each in default to suffer further rigorous imprisonment for two months.

The prosecution case originated out of a complaint dated 08.08.1995 filed by the complainant inter alia stating on 05.08.1995 in absence of her

husband, she was staying alone in her room along with two minor sons at village Gorara. The appellant Hayatolla Sk came to her bed and embraced her suddenly claspng her mouth preventing her to cry. The other appellant Mustafa Sk appeared and tried to outrage her modesty. Both the appellants were residents of village Gorara and the incident took place at about 12 in the night. Mojibur Rahaman of the next house came to her room when the complainant managed to cry aloud. The miscreants fled prior to the arrival of Mojibur Rahaman. The complainant disclosed the incident to Mojibur Rahaman. She prayed for an enquiry and punishment of the miscreants.

Based on the written complaint Nabagram PS case no. 77/95 dated 08.08.1995 was initiated against the appellants under Section 376/511/34 IPC. The investigation ended in the submission of a chargesheet bearing no. 73 dated 27.08.1995 under Section 376/511/34 IPC against both the appellants. Charges were framed to which both the appellants pleaded not guilty and claimed to be tried.

The prosecution in order to establish its case cited eight witnesses and exhibited certain documents.

The Ld. Advocate for the petitioner submitted the complaint was lodged on 08.08.1995 after a delay of three days of the alleged incident. The complainant did not cite any reason for such delay. The appellant and the complainant belong to different political party with clash of interest as a resultantly the complainant falsely implicated the appellants motivatedly. The

investigation was perfunctory as would reveal from the evidence of PW 2 who was asked to write the complaint to be treated as FIR by the Police officer. No eyewitness apart from the complainant was cited by the prosecution. The neighbours were not examined. There were inconsistencies in the deposition of the prosecution witnesses. Moreover, it was uncanny for the complainant to sleep inside an unlocked room with her minor sons at about 12'o clock in the night. A locked room would not have been easily accessible by mere pushing of the same. The complainant out of grudge owing to disparity of political interest had inculpated the appellants with ulterior motive and the appeal shall be allowed.

The Ld. Advocate for the State stated that the materials on record did not conform to the ingredients to constitute an offence under Section 376/511 IPC and left it to the discretion of the Court.

Assailing the evidence of the prosecution witnesses it transpired that PW 1 the complainant was sleeping in the room of her house with two of her children in absence of her husband who had been to Burdwan. At about 12'o clock in the night the appellants pushed the door of her room, opened it and thereafter caught hold of her threatening to kill her in case she raised alarm. The accused person put a napkin into her mouth and tried to commit to rape on her. She kicked both the appellants and came out of her room crying and weeping aloud when Mojibur Rahaman arrived at the spot to whom she narrated the incident. The complaint was written by Kashinath Ghosh with her

LTI on it. PW 2 Kashinath Ghosh identified his handwriting and signature on the complaint treated as FIR dictated by the PW 1 marked as Ext. 1 and 1/1 respectively and he wrote the name of the complainant under her LTI.

During his cross examination PW 2 stated to have been supplied with a blank sheet by the police officer who told him to write an FIR in certain manner which he complied.

PW 3 Bhanu Dasi stated to have seen the complainant weeping in the morning narrating two persons to have entered in her room at 12'o clock in the night to commit rape upon her without disclosing their names to her. PW 2 was declared as hostile by the prosecution. PW 2 refuted to have stated to the Investigating Officer that PW 1 recognised the miscreants.

During her cross-examination PW 3 stated Mojibur to be a visitor of PW 1 with a good relation between them.

PW 4, 5 and 7 were declared hostile by the prosecution.

PW 6 Mojibur Rahaman stated on the relevant day at the night he heard from PW 1 that the appellants entered into her house and thereafter fled.

PW 8 the S.I. A.K Chakraborty the Investigating Officer being endorsed to conduct the investigation of Nabagram PS case no. 77/95 dated 08.08.1995 under Section 376/511 IPC visited the place of occurrence prepared the rough sketch map with index in his handwriting and signature thereon marked Ext. 2 and 2/1 respectively. He recorded the statements under Section 161 Cr.P.C.

and arrested Mustafa on 14.08.1995 and on completion of the investigation submitted chargesheet bearing No. 73 dated 27.08.1995 under Section 376/511/34 IPC.

The ingredients to commit an offence of rape could not be established by the prosecution. The rough sketch map along with the index marked as Ext. 2 and 2/1 did not delineate the house of PW 6 Mojibur adjacent or in the vicinity of the house of the complainant PW 1. His presence at the place of occurrence hearing the cry of the complainant of PW 1 is figmentary. It is surprising that the people in the neighbourhood or in the houses adjoining the house of the complainant could not hear her cry to come to her rescue. Nobody witnessed the appellants to flee from the spot. The complainant was not subjected to medical examination nor produced before the Court to record her statement under Section 164 Cr.P.C. Apart from PW 1 and PW 8 the entire evidence of the prosecution witnesses was based on hearsay. The napkin which was alleged to have been put into the mouth of PW 1 was not seized. The investigation was shoddy, conducted in a slapdash manner and should be deprecated. The prosecution has failed to establish its case and accordingly the appeal is allowed.

Connected applications, if any, also disposed of.

It is informed that appellants are on bail. Bail bond of the two appellants shall be discharged after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

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.)