

**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

**C.R.A.338 of 2021
IA NO: CRAN/1/2022**

**Alauddin Kabiraj
VS.
The State of West Bengal.**

For the Appellant : Mr. Kallol Mondal,
Mr. Krishan Ray,
Mr. Souvik Das,
Mr. Samsheer Ansari
Mr. Ayan Mondal

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

For the Victim : Mr. Bibaswan Bhattacharya,
Ms. Bindia Paul

Hearing concluded on : 11.04.2023.

Judgement on : 11.04.2023.

DEBANGSU BASAK, J.:-

1. The appeal is directed against judgment of conviction dated February 19, 2021 and order of sentence dated

February 22, 2021 passed by learned Additional Sessions Judge, 2nd Court, Hooghly in Sessions Trial (Spl) No.48/16 arising out of Sessions Case (Spl) No.11/16.

2. Police received a complaint on February 3, 2011 from the mother of the victim being prosecution witness (P.W.2). On the basis of such written complaint, police registered Tarkeshwar Police Station F.I.R. No.24 of 2010 dated February 3, 2016 under Section 376(2)(i)/504 of the Indian Penal Code, 1860 and under Sections 3/ 4 of the Protection of Children from Sexual Offences Act, 2012.

3. On the conclusion of the investigating, police submitted charge-sheet against the appellant. On June 10, 2016 charges as against the appellant were framed under Section 376(2)(i)/506 of the Indian Penal Code, 1860 read with Section 4 of the Act of 2012. The appellant pleaded to be not guilty and claimed to be tried.

4. At the trial, prosecution examined 19 witnesses and relied upon various documentary evidences to prove the charges as against the appellant.

5. At the trial, the case of the prosecution was that, the victim was about 13 years of age and studying at the school. The appellant was known to her grandmother (the mother of the P.W.2) and was in visiting terms in the house of her grandmother. On February 2, 2016, the appellant came to the house of the mother of the victim and took the victim for the purpose of preparation of Aadhar card. After taking the victim to a particular place, the appellant put the victim in a room and closed the door from inside. The victim came back to her home at night and confided in P.W.2 that the appellant forcibly committed rape on several occasions on her for the last four months sometime in the house of her grandmother and some time at a shop and threatened her not to disclose the same to anybody.

6. On February 2, 2016, appellant compelled the victim to sign some papers which the victim presumed to be regarding marriage. The appellant also kissed and pressed the breast of the victim when she was coming out of the room.

7. Learned advocate appearing for the appellant submits that the prosecution was unable to prove the charges as

against the appellant beyond reasonable doubt. He draws attention of the Court to the oral testimonies of various prosecution witnesses. He refers to the contents of written complaint and the statement of the victim recorded under Section 164 of the Criminal Procedure Code. He submits that there are fundamental contradictions between those two documents and the oral testimony of the victim. P.W.10, 11 and 13 spoke of attempt to marry. The medical evidence did not establish penetrative sexual assault on the victim. He submits that no independent witness came on behalf of the prosecution to establish the claim of the prosecution. Consequently, according to him, the appellant should be acquitted of the charges.

8. Learned advocate appearing for the State submits that the prosecution was able to prove the charges beyond reasonable doubt. She refers to the deposition of the victim as also the doctor who examined the victim. She submits that, penetrative sexual assault of the victim stood established by the prosecution at the trial. The same will appear from the oral

testimony of P.W.1 as well as the doctor examining her being P.W.9.

9. Learned advocate appearing for the de facto complainant submits that the prosecution was able to establish the charges as against the appellant beyond reasonable doubt. In support of such contention he also relies upon the oral testimonies of P.W.1 and P.W.9. He submits that the oral testimony of P.W.1 was corroborated by P.W.2.

10. P.W.1 is the victim. She stated that she was residing with her grandmother since her childhood. She used to call the appellant as grandfather by village curtesy. Appellant was the brother of her grandmother by village curtesy. The appellant used to come to the place of her mother where the victim was residing with her mother. The appellant told her mother that he came to prepare Aadhar Card for her. The appellant stayed there for two days. During the course of his stay, one day, in absence of her mother, the appellant raped her.

11. P.W.1 stated that, her mother came to her grandmother's place and left her there as her school opened after vacation. One day after the appellant called her grandmother over phone

and asked her to go to a shop, there the appellant showed her video clipping of their sexual activities and threatened her if she disclosed anything to others then he would send the same to her mother and others. Thereafter, subsequently, on that pretext and of threat the appellant committed rape upon her on several occasions. She identified the shop where such incident took place. She stated that the appellant took her signatures on various blank papers upon holding out threat. Then one day, when her mother came to her grandmother's place, the appellant took her and her mother to the bus stand where he asked her mother to wait for sometime. Then once again, appellant took her to a shop and asked her to say "kabul". Thereafter, she fled away from the place and came to her mother. Then after reaching the residence of grandmother, she disclosed everything to her mother of what was happening for last four months. In total, appellant committed rape upon her for six times. P.W.1 stated that she was interrogated by the Investigating Officer. She went to the Court and recorded her statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit-

1. She was medically examined by the doctor by the District Hospital. She identified the appellant in Court.

12. P.W.2 is the mother of the victim and stated that a person wrote the written complaint lodged with the police. She corroborated the statement of the P.W.1. She stated that, P.W.1 asked her what was the meaning of “Nikha” when she explained to her about “Nikha”. P.W.1 also wanted to know about “Kabul”. She said that P.W.1 told her about the forcible sexual assault on her by the appellant.

13. P.W.2 narrated she went to police station and stated everything to the police. One person at the police station wrote the complaint as per her statement and she put her left thumb impression on written statement. She identified the appellant in Court.

14. P.W.2 stated that during investigation police collected wearing apparels of the victim. She put her left thumb impression on the paper relating such seizure. She was interrogated by the police. P.W.1 was medically examined. She went to the learned Magistrate and recorded her statement

under Section 164 of the Criminal Procedure Code where she put her left thumb impression.

15. The Judicial Magistrate before whom, P.W.1 and P.W.2 recorded their statements under Sections 164 of the Criminal Procedure Code deposed as P.W.3. Such Judicial Magistrate identified his signature on the statement of the victim which was marked as Exhibit.1/1. The Judicial Magistrate tendered the statement of P.W.2 which was marked as Exhibit-2.

16. The grandmother of the victim deposed as P.W.4. She corroborated P.W.s 1 and 2 with regard to the events narrated by P.W.s1 and 2 relating to the appellant.

17. The lady police constable who prepared the seizure list on February 4, 2016 deposed as PW.5. She identified her signature thereon. The seizure list was marked as Exhibit-2.

18. The scribe of the written complaint deposed as P.W.6. He identified the written complaint which was marked as Exhibit-3 and signature thereon as Exhibit-3/1.

19. A seizure list witness to the seizure list dated February 3, 2016 deposed as P.W.7. His signature in such seizure list was marked as Exhibit-4.

20. The police constable who was present during the seizure list prepared on February 4, 2016 deposed as P.W.8. His signature on such seizure list was marked as Exhibit-2/1.

21. The doctor who examined the victim on February 3, 2016 deposed as P.W.9. He stated that, the victim was produced before him and identified by the lady constable P.W.5. He stated that, on examination he found old injury on hymen at 3'o clock position. He stated that, as per the statement of the victim, there were multiple incidents for the last four months. He tendered his report which was marked as Exhibit-5.

22. A shop owner of the bus stand deposed as P.W.10. He stated that, he saw the appellant and another person come to the shop and talk about marriage registration. He asked them to go to the Marriage Registration office.

23. P.W.11 claimed in his oral testimony that, the appellant came to him and asked him to arrange marriage registration of his niece as he was acting as a Commission Agent of Marriage Registration Officer. He asked the appellant to come to a particular place. Accordingly, the appellant came with a girl of tender age. He asked the appellant about the identity of the

girl. The appellant failed to produce any document of age of that girl. The girl was a minor as it appeared from her physique. He refused the proposal of the appellant and left the place.

24. The photographer who did the video photography of the statements made by the appellant and the victim deposed as P.W.12. The compact disc in which such video photography of the statements were recorded was seized by the police on March 29, 2016. He identified his signature on such seizure list which was marked as Exhibit-6.

25. The uncle of the victim deposed as P.W.13. He stated that, one day he found the victim crying. He asked the mother of the victim regarding the cause of the victim crying when the mother of the victim told him that the appellant took the victim and her mother to a particular place for the purpose of making Aadhar card and after taking them there, the appellant obtained signatures of the victim on various papers with the intention to marry her. The mother of the victim lodged a written complaint against the appellant.

26. Police constable who took the appellant to the hospital for medical examination deposed as P.W.14. He witnessed the seizure made on February 5, 2016. His signature on such seizure list was tendered in evidence and marked as Exhibit-7.

27. Another police constable who took the appellant to the hospital for medical examination deposed as P.W.15. He stated that, after completion of the medical examination of the appellant, he was made over a sealed container. He identified his signature on the seizure list dated February 5, 2016 which was marked as Exhibit-7/1.

28. A police personnel who witnessed the seizure on February 10, 2016 deposed as P.W.16. His signature was tendered in evidence and marked as Exhibit-8.

29. A police personnel who witnessed the seizure on February 5, 2016 deposed as P.W.17. His signature was tendered in evidence and marked as Exhibit-7/2.

30. The doctor who examined the appellant on February 4, 2016 deposed as P.W.18. He tendered his medical examination report of the appellant in evidence which was marked as Exhibit-9.

31. The Investigating Officer deposed as P.W.19. He narrated about the course of the investigations. The formal First Information Report was tendered in evidence and marked as Exhibit-12. The sketch map relating to the place of occurrence along with index was tendered in evidence and was marked as Exhibits-14 and 15 collectively. He identified and tendered in evidence the material exhibits.

32. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Code of Criminal Procedure where he claimed to be innocent and not guilty. He declined to adduce any defence witness.

33. Victim narrated her ordeal at the trial. She stated that, the appellant raped her six times.

34. The victim was examined by the doctor who deposed as P.W. 9. Doctor being P.W. 9 examined the victim on February 3, 2016. On examination, the doctor found an old injury on the hymen at 3 O'clock position.

35. Testimony of the doctor examining the victim and his report being exhibit 5 read with the testimony of P.W. 1

establishes repetitive penetrative sexual assault on the victim by the appellant.

36. It is the contention of the appellant that there are embellishments between the contents of the written complaint being exhibit 1 and that of the oral testimony of the victim, P.W. 1.

37. Written complaint was lodged by the mother of P.W. 1. P.W. 1 is the victim, who narrated, as noted above, her ordeal at the hands of the appellant in Court. There is nothing to disbelieve the oral testimony of the victim. We are not in a position to return to a finding that there are material differences between the versions of the written complaint and the oral testimony of P.W. 1.

38. P.W. 1, as the victim, narrated about the incidents between the appellant and her which spanned over a period of time. P.W. 1 was cross-examined at length on behalf of the defence. No material helpful to the defence was extracted by such cross-examination of P.W. 1.

39. Appellant was known to the victim. Presence of the appellant and the victim at material points of time stood

established at the trial. The version of P.W. 1 with regard to appellant gaming access on her over the period of time, stands corroborated by the testimonies of the mother of the victim being P.W. 2 as well as the grand-mother of the victim being P.W. 3.

40. Independent witnesses saw the appellant and the victim together. Independent witnesses also deposed that the appellant came to them and the appellant discussed about marriage.

41. P.W. 1 as the victim stated in her oral testimony that attempts were being made the appellant to marry her.

42. The testimonies of the prosecution witnesses are credible and trustworthy. They were cross-examined at length without the defence extracting anything favourable to them. The victim was a minor was established by the testimonies of P.W. 1, P.W. 2 and P.W. 9.

43. In the facts and circumstances, the prosecution was able to establish penetrative sexual assault on the minor repetitively.

44. By the impugned order of sentence, the appellant was sentenced to suffer rigorous imprisonment for 12 years and to pay a fine of Rs.12,000/- and in default to suffer another rigorous imprisonment for 20 days for the offence punishable under Section 376(2)(i) of the Indian Penal Code, 1860. The appellant was also sentenced to rigorous imprisonment for 14 years and a fine of Rs.20,000/- and in default another rigorous imprisonment for sixty days for the offence under the Act of 2012.

45. We find no reason to interfere with the impugned judgement of conviction or the impugned order of sentence.

46. Period of detention suffered by the appellant pre-trial, during the trial and post trial be set off against the sentences narrated. The sentences shall run concurrently.

47. A copy of this judgement and order along with trial Court records be transmitted to the appropriate Court forthwith for necessary action.

48. CRA 338 of 2021 is dismissed.

49. In view of the dismissal of the appeal, CRAN 1 of 2022 is also dismissed.

50. Urgent photostat certified copy of this order be given to the parties expeditiously, if applied for.

(Debangsu Basak, J.)

51. I agree.

(Md. Shabbar Rashidi, J.)