

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 605 of 2006

Brajanath Murmu

-Vs-

The State of West Bengal

Amicus Curiae : Mr. Amartya Ghosh

For the State : Mr. Joydeep Roy
Ms. Sujata Das

Heard on : .26.09.2023, 13.12.2023.

Judgment on : 18.12.2023

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 28.07.2006/29.07.2006 passed by the Learned Additional Sessions Judge, 5th Court, Paschim Midnapore in Sessions Trial Case No. XLV of August, 2001 convicting thereby the appellant for commission of an offence punishable under Section 376(1) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 2,000/- in default to suffer rigorous imprisonment for a further period of six months.
2. The prosecution case in brief is to the effect that the appellant happened to be the private tutor of the complainant's daughter, the victim. On 30.10.97 at about 9:30 p.m. he called the victim to a nearby bamboo clump and

committed rape upon her. The appellant also threatened her not to disclose the aforesaid incident in public. On 31.10.97 the victim was found to be suffering in pain and was also bleeding from her private parts. The complainant being suspicious enquired the reasons for the same. Initially she did not divulge anything out of shame but subsequently she apprised her parents about the said incident. She was initially examined by a local doctor and later she was taken to Debra Primary Health Centre as per the advice of the local doctor where the attending doctor advised to get her removed to Midnapore Sadar Hospital for treatment. A written complaint was lodged with Debra Police Station by the mother of the victim and on the basis of such complaint Debra Police Station Case No. 87 dated 01.11.97 under Section 376 of the Indian Penal code was started against the appellant.

3. After completion of the investigation the Investigating Agency submitted its report in final form vide Charge Sheet No. 82/98 dated 09.12.98 inter alia alleging commission of an offence punishable under Section 376 of the Indian Penal Code being committed by the appellant.
4. Upon receipt of the said Charge Sheet the Learned Sub-Divisional Judicial Magistrate, Midnapore was pleased to take cognizance of the offence and after compliance of necessary formalities committed the case to the Court of Session vide his order dated 16.05.2001. The Learned Sessions Judge, Paschim Midnapore was pleased to transfer the case to the file of the Learned Judge for trial. Thereafter charge was framed against the appellant for his involvement in commission of an offence punishable under Section 376(2)(f) of the Indian Penal Code and as the appellant pleaded not guilty to

the charge so framed against him, he was placed on trial to answer the same.

5. During the course of trial that followed, the prosecution in order to prove its case examined as many as 14 witnesses and exhibited certain documents while the defence examined none and the defence case was one of denial and false implication.

6. Learned *Amicus Curiae* appearing on behalf of the appellant submitted that –

- i. The order of conviction and sentence as has been recorded against the appellant is a glaring example of non-application of judicial mind by the Learned Judge wherein the Learned Judge has not at all taken into consideration the broad/salient features that have emerged through the evidence, more particularly from the cross examination of the prosecution witnesses and the impugned order of conviction and sentence are bad in law and liable to be set aside.
- ii. Abnormality in the prosecution case was writ large on it. It was said that at about 10 O'clock when PW-6 was returning to the Kali Puja Mandap along with the priest and other female folks of the village after collecting water from a nearby tank, the appellant called her and took her to a nearby bamboo clump where she was divested of her wearing apparels and ravished against her wishes. Thereafter PW-6 went to the "Puja Mandap". She, however, did not tell anybody about the aforesaid incident. She thereafter being accompanied by her parents went to her house and slept for the entire night. There is some confusion as to when she actually started feeling pain. As per her opinion she started experiencing pain in the early morning and then told her parents

about the aforesaid incident. Subsequently her parents arranged for her treatment. As per the evidence of her parents she started feeling pain in the night only after returning home when it was revealed that she had been sexually ravished by the present appellant. The fact that the incident took place on the day of Kali Puja at night, she went with the priest to collect water, on her return journey she was called by the appellant and taken to a bamboo clump were absent in the complaint which had been lodged by PW-1. PW-1 described the time and hour of incident as 9:30 a.m. while the witnesses during their course of deposition in trial told about the incident occurring at 10:00 p.m.; it was revealed from the evidence of PW-1 that they had a car at their disposal but it was not known why, when the factum of such incident was known to the inmates of the house of PW-6, she was not immediately taken for medical treatment to Debra Primary Health Centre or Midnapore Sadar Hospital. These aforesaid aspects, however, have been totally overlooked by the Learned Judge while recording an order of conviction and sentence against the appellant.

- iii. It was the case of the defence that while the appellant was trying to teach PW-6 how to ride a cycle she sustained injury while falling from the cycle. This theory had been probablised by the evidence of PW-13. PW-13's specific case is that if there is an encounter in the private parts of a male and a female for the first time, labia majora is the first place which will be affected; he admittedly did not find any injury on such private parts of PW-6. It is also forthcoming from the evidence of PW-6 that if a patient falls on a handle of a bicycle having cover at its

tips usually injury on the private parts of PW-6 can be found, there might be other injuries also. The same depend on how she fell on the bicycle but at any event the wearing pant of the victim would be torn, now if we look at the evidence of PW-14 we find that the First Investigating Officer of the instant case had seized a green colored pant of the victim, front portion of which was in a torn condition. In other words, medical evidence coupled with the evidence of the Investigating Officer who had filed Charge Sheet not only demolishes the prosecution case but also probablises the defence theory to its hilt; the Learned Judge in spite of that being the state of affairs, by recording an order of conviction and sentence against the appellant fell in serious error of law.

- iv. Although lots of contradictions are appearing on the face of it in the evidence of PWs 1 to 6 with regard to the time, manner and the circumstances under which the aforesaid incident took place, the Learned Judge came to the aid of the prosecution by holding that the same are of trivial nature and does not affect the prosecution case.
- v. Immediately after the incident PW-9 was allegedly called by PWs 1 and 2 to medically treat PW-6. So far as the evidence of PW-9 is concerned he gives a total clean chit to the appellant. His evidence squarely supports the defence theory that the victim had sustained injuries having had suffered a fall. Although this witness was declared hostile by the prosecution the same also casts a grave shadow of doubt over the veracity of the prosecution case.

- vi. PW-10 was a relation of PW-6. PW-2 was allegedly her 'Bhasur'. She has also duly negated the prosecution case; the same is the case with regard to the evidence of PW-11 who is a neighbor of PWs 1 and 2 who has also not supported the prosecution case.
- vii. In the instant case the Investigating Officer who had examined the witnesses at the initial stage and recorded their statements under Section 161 of the Code of Criminal Procedure has not been examined by the prosecution for reasons best known of it. For this reason, the appellant was not able to take contradictions from the Investigating Officer with regard to the earlier statements of the prosecution witnesses, causing serious prejudice to his defence case. This aspect has not at all been taken into consideration by the Learned Judge while recording an order of conviction and sentence against the appellant and as such the Learned Judge fell in serious error of law.
- viii. It is alleged that the complaint giving rise to the instant case was lodged at 12:35 hours by PW-1 who is a lady. This circumstances of lodging a complaint by a housewife at the dead hours of the night who resides in a village also raises a strong suspicion in the mind of a man of reasonable prudence as to the veracity of the prosecution case.
- ix. The overall assessment of the evidence by the Learned Judge is unworthy of any credit and acceptance by a man of reasonable prudence; each part of the prosecution case is tainted with meagerness of evidence and/or absence of satisfactory evidence. But the Learned Judge in a very slipshod and casual manner discussed the

evidence, wherein he left the material facts aside from his consideration and thus acts with serious illegality.

- x. The order of conviction as recorded against the appellant is based on evidence illegally admitted and/or non-consideration of material pieces of evidence brought out through cross examination; the Learned Judge acted in defiance of the sense of justice and the provisions of law by filling up the gap in the prosecution case and by introducing imaginary facts and conjectural circumstances.
- xi. The order of conviction and sentence as recorded against the appellant is unsustainable in law inasmuch as it has not been proved beyond reasonable doubt on clinching and categorical evidence that the incident had occurred on the date, at the time and at the place under the circumstances as alleged by the prosecution.
- xii. The judgment and order of conviction and sentence recorded against the appellant as also the sentence imposed on him are bad in law, liable to be set aside on grounds of patent violation of the mandatory procedure of law and denial of fair trial to the appellant.
- xiii. The examination of the appellant under Section 313 of the Code of Criminal Procedure has totally negated the very principle and object of offering an opportunity to an accused to explain away the circumstances appearing from the evidence against him; regard being had to the nature of the law contained in Section 313 aforesaid and the salutary object that it seeks to achieve from the point of view of an accused, each question should be brief and precise so as to give a common man or men who has or have no knowledge of law to

understand not merely the factual implication of such question but also the legal consequences that might arise from the answer given to such question; unduly long and compound questions in which several facts are jumbled up not only confuses the mind of a lay man but it becomes impossible for such a person to formulate an answer effectively and appropriately from his point of view. The long question with several facts jumbled up into it together with the situation prevailing in a court room totally confuses the mind of a person who exchange dialogue with the Court without the assistance of a lawyer. Examination of the appellant under Section 313 of the Code of Criminal Procedure in the instant case has been a total frustration of the right of the appellant envisaged under the said provisions of law.

xiv. Upon a proper appreciation of the evidence on record and correct assessment of the provisions of law, the Learned Judge ought to have held that the prosecution has failed to bring home the charges levelled against the appellant and that the prosecution case is a mixture of lies and improbability.

xv. In view of reception of inadmissible evidence and reliance placed thereon by the Learned Judge, the order of conviction and sentence cannot be sustained both in law and facts.

7. The Learned Advocate for the State submitted on the basis of a reasoned judgment the appellant had been convicted as the prosecution had been able to prove its case beyond reasonable doubt barring the lapses which did not affect the crux of the prosecution case and the appeal shall be dismissed.

8. PW- 1 narrated the course of the incidence as divulged by her daughter the victim to have been ravished by the appellant and thereafter the unbearable pain in her private parts divulged on persuasion. She was initially examined by a quack doctor namely Swapan Jana and thereafter she was discharged to Debra P.H.C thereafter she was shifted to Midnapore Sadar Hospital and discharged after fifty days. PW-1 identified her signature on the complaint marked as Exhibit 1/2
9. The testimony of PW-2, PW-3, PW-4, PW-5, PW-8 corroborated the evidence of PW-1. PW-6, the victim deposed the entire episode of being ravished by the appellant and her subsequent hospitalization. PW-7 was the scribe of the complaint who identified his signature to be marked at Exhibit 1/2. PW-9, PW-10, PW-11 were declared hostile by the prosecution. PW-12, the radiologist conducted the ossification test of the victim and opined her age to be in between 10-12 years on the date of examination. He identified the report along with x-ray plates marked at Exhibit-3. PW-13, the gynecologist posted at Midnapore Sadar Hospital examined the victim and opined as follows:

“On her examination I found extended lacerated injury on her fourchette with bleeding, stitch of fourchette done by MO in-charge of Karka Hospital. She was examined under Anesthesia on 3.11.97. There was lacerated injury extended upto fourchette 3/4” x 1.8” depth with bleeding point. The injury was repaired in layers and the vagina accommodated one finger. The injury on her private parts was caused by forceful thrash of soft tissue structure one inch radius. The injury may be due to rape, but entry chemical examination will help about this. Her vaginal canal was full of blood so vaginal smear could not be taken. This is the certificate issued by me and the same bears my signature (Ex 4.4). The patient was

discharged on 12.11.97 from the hospital. This is her discharge certificate and the same also bears my signature (Ext. 5). The patient was sent to the Radiologist for ascertaining the age of the patient. This is the requisition slip issued by me (Ext. 6.)”

10. The statement recorded under Section 164 Cr.P.C. marked as Exhibit 2/1 had not been deviated by the victim in her deposition before the court. Being a minor child of 12 years will not necessarily implicate the tutor of such an act who otherwise would be held in a position of respect and honour. The hospitalization and the injuries sustained by the victim, if at all to be attributed to a fall from a cycle as claimed by the defence, could have been naturally and conspicuously detailed by the victim. There was no occasion for a minor child within the age group of 10-12 years to concoct such an incident where she herself sustained pain and harm to her body which eventually was traumatic causing serious ramification of far-reaching consequences both detrimental to her physical and mental development. A child will not be tutored to such an extent by the parents in the absence of an enmity with the appellant to induce her or instigate her to fabricate such a condemnable and contemptuous act. Minor contradictions with regard to time and date of occurrence based on the human memory and its fallibility are not fatal to the prosecution case. The evidence of PW-13 cannot be considered to be sacrosanct since the oral evidence of the minor child is more credible in the facts and circumstances of this particular case. PW-9, PW-10 and PW-11 who were declared as hostile witnesses did not indicate any acrimonious relationship between the parties or any political rivalry to have existed between them or their family in any manner. The prosecution has been successful in proving its case and the appeal has been dismissed.

11. In view of the above discussions, Criminal Appeal being CRA 605 of 2006 is accordingly dismissed.
12. There is no order as to cost.
13. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Amartya Ghosh, as *Amicus Curiae* in disposing of the appeal.
14. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
15. 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.)