

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

***Before: Hon'ble Justice Sugato Majumdar***

**CRA 687 of 2015**

**Naresh Chandra Halder  
Vs.  
The State of West Bengal**

**For the Appellant : Mr. Sandipan Ganguly (Sr. Advocate),  
Mr. Karan Dudhwewala.**

**For the State : Mr. Tanmay Kr. Ghosh (Ld. SGA),  
Mr. Arindam Sen**

**Hearing concluded on : 16/02/2023**

**Judgment on : 23/02/2023**

**Sugato Majumdar, J.:-**

The instant appeal is preferred against the judgment dated 19/09/2015 and order of sentence dated 22/09/2015 passed by the Additional Sessions Judge, 3<sup>rd</sup> Fast Track Court, Berhampore, Murshidabad in Sessions Trial No. 4(1) of 2009 under Section 376 of the Indian Penal Code.

The prosecution case owes its origin to the written complaint lodged by the de-facto complainant being the mother of the victim. It is stated in the written complaint that the victim was missing from the evening of 11/10/2008. In spite of thorough search she could not be traced out. She returned home next

morning in a disoriented condition. On query she disclosed that the Appellant induced the victim on 11/10/2008, in the evening, to accompany him to a hotel at Murshidabad. The Appellant took the victim in a room located in the second floor and committed rape upon her. In spite of resistance made by the victim the Appellant represented her that he would marry. On the next morning, he allowed her to go on understanding that she would tell her parents that they are married. When the entire incident was intimated by the victim to the de-facto complainant, her mother, she stated the same to her husband as well as to the local people. Initially the father of the Appellant stated that the matter would be settled in local *salishi* with intervention of local people, but the *salishi* fared no fruitful result. Thereafter, the de-facto complainant lodged the written complaint in Beherampur Police Station, Murshidabad.

The written complaint was received on 18/10/2008 at 11:15 hours and was registered as P.S. Case No. 05/08/2008 dated 18/10/2008 under Section 376 of the Indian Penal Code. Formal F.I.R was drawn up and an Investigating Officer was entrusted with investigating into the case. The victim's statement under Section 164 of the Code of Criminal Procedure was recorded; she was medically examined; her wearing apparels were seized on preparing seizure list. Apart from this, hotel register was seized from the concerned hotel, namely, Hansraj Hotel. Ossification test of the victim was also conducted to ascertain her age. After completion of investigation, charge sheet was filed. Since the case is exclusively triable by the Court of Sessions it was committed to the Court of Sessions by the

Chief Judicial Magistrate, Murshidabad wherefrom it was transferred to the Trial Court on taking cognizance of the offence.

Charge was framed under Section 376 of the Indian Penal Code which was read over and explained to the Appellant to which she pleaded not guilty and claimed to be tried. Thereafter, the trial began.

In course of trial the prosecution produced sixteen witnesses. Various documents produced and admitted as evidence were marked as Ext. 1 to 7. Wearing apparels of the victim were adduced in evidence and marked collectively as Mat. Ext. 1.

No evidence was adduced on behalf of the Appellant.

Defence of the Appellant, as appears from the trend of cross-examination as well as from the answers given in course of examination by the Court under Section 313 of the Code of Criminal Procedure, is false implication.

The Trial Court found the Appellant guilty of charge leveled under Section 376 of the Indian Penal Code and convicted him according. The Trial Court sentenced him with rigorous imprisonment for seven years as well as fine of Rs. 5,000/- in default of which additional rigorous imprisonment for a term of one year and six months.

On being aggrieved and dissatisfied the incident is preferred.

Mr. Ganguly, the learned Senior Counsel appearing for the Appellant submitted that:

Firstly, there is a delay of eight days in lodging the FIR. It is in the evidence that the de-facto complainant waited for settlement through *salishi*. *Salishi* took place on 14/10/2008 but the written complaint was lodged on 18/10/2008. There is delay of four days which is unexplained importing chances of concoction, coloration and deliberation in lodging the written complaint. In nutshell, unexplained delay in FIR cannot be relied upon and casts serious doubt in the prosecution case.

Secondly, there is no evidence of *salishi* by any witnesses, whatsoever there is no evidence that *salishi* took place after the alleged incident.

Thirdly, Mr. Ganguly argued that the victim stated in her evidence that she narrated the incident to police authorities who reduced the statement into writing and got her signature but that statement is neither treated as First Information Report nor adduced in evidence rather the statement of the mother of the victim scribed by someone else was accepted, relied and acted upon to draw the formal F.I.R. This casts doubt on the prosecution case accommodating doubt and suspicion.

Fourthly, PW 7 or 8 who was staff of Hansraj Hotel where the alleged incident of rape took place did not identify the Appellant in Test Identification Parade rather they identified the accused

Appellant for the first time in the Court. Such identification cannot be relied upon.

Fifthly, it is argued that ossification test report does not support the prosecution case that the victim was minor, that the medical document does not corroborate the version of the victim. Since material evidence are at variance with victim version or statement and since there is no other evidence indicating or establishing the alleged offence circumstantially or directly, prosecution cannot be said to establish the alleged charge against the Appellant.

Sixthly, it is argued that the Investigating Officer was not examined by the prosecution. No explanation is given why Investigating Officer was not examined. According to Mr. Ganguly non-examination of Investigating Officer seriously hamper of the case of the prosecution as there is no link to establish the chain of events.

In nutshell, Mr. Ganguly argued that the Trial Court without appreciating the evidence properly and without proper application of law erroneously convicted and sentenced the Appellant which should be set aside.

The learned Public Prosecutor, on the contrary, strenuously argued that the prosecution case is well-established by cogent evidence. It is argued that victim's statements, recorded under Section 164 of the Code of Criminal Procedure as well as victim's deposition, are not at variance. They are rather

corroborative. Minor discrepancies may likely to result after lapse of time but such discrepancies do not vitally affect the prosecution case or render it unreliable. It is settled law, according to the Learned Public Prosecutor, that conviction may be based on victim's consistent and reliable evidence in rape cases if supported by medical evidence. According to the learned Public Prosecutor the Trial Judge well-appreciated the evidence applied the correct principle of law. The Trial Judge considered the principle of law laid down in statement of **The State of Punjab and Gurmit Singh and Ors.** reported in AIR (1999 SC 1393) along with other decisions that there is no error either in appreciating evidence or in passing the judgment of conviction and order of sentence, according to the Learned Public Prosecutor. Relying upon the principles laid down in **Vishnu @ Undrya vs State of Maharashtra [(2006) 1 SCC 283]** he submitted that medical evidence has no precedence over ocular evidence. The opinion of the medical officer is to assist the Court, but he is not a witness of fact. Referring to the decision of the Supreme Court of India in the **State of U.P. Vs Chhoteylal [(2011) 2 SCC 550]** it is submitted that there is no rule that two years are to be added to medical estimation of age. It is further submitted that the evidence of the victim of rape cannot be taken with doubts and suspicions. Reference was also made to **Badal Toppo vs. State of Bihar [2004 AIR Jhar R 248]**

I have heard rival submissions.

Genesis of the prosecution case is the written complaint, as stated earlier which was lodged on 18/10/2008 by the mother of the victim. According to the

written complaint, the incident took place on 11/10/2008. It is explained in the written complaint since the victim and her family waited for an outcome and solution in village *salishi*, there was delay in lodging the written complaint. The victim stated in her cross examination that ten or twelve days after the incident she along with her parents went to police station to meet with the police persons. Her statements were written down and she signed on it. P.W.2 the de-facto complainant and mother of the victim stated that she went to Berhampore police station where the scribe drafted the complaint. P.W.3, the father of the victim stated in course of cross-examination that one day after *salishi* he along with others went to Berhampore Police Station and narrated the incident to police but police did not write anything on the incident. Statements of the three witnesses do not corroborate each other. Rather, there are different versions regarding first information to police. The de-facto complainant, during her evidence stated nothing about giving statement to the police by the victim and reducing the same into writing by them. There remains ambiguity as to what is the first information to the police authority. Evidence of the Investigating Officer could have cleared such doubts.

Mr. Ganguly strenuously argued that delay in lodging the F.I.R is fatal to the case. The mother of the victim (PW 1) stated that since they were waiting for the outcome in the *salishi* there, occurred delay in submitting the written complaint. PW 3, the father of the victim stated in evidence that on the day after *salishi* he went to the police station to report the incident. This apart delay is of seven days. Therefore, this Court is of opinion that in the conspectus of the

present facts and circumstances delay, by itself, is not fatal for the prosecution case.

The case set out in the written complaint (Ext.4) is that the victim was missing from the evening of 11/08/2008. She could not be traced out in spite of thorough search. On the next morning the victim returned home in with disoriented appearance. From the victim the de-facto complainant, being the mother came to know that the Appellant allured the victim with food in the evening of 11/10/2008 and took her to the hotel. It is also set out that the appellant offered the victim to the second floor room and committed rape upon her in spite of her protests and further that the Appellant assured the victim to marry. The victim's version is that she went to ration shop which was closed. So she was waiting for bus. At that time the Appellant came on motor-cycle and took her to the hotel. It was 8-8.30 a.m. Inside the hotel, she was taken in a room in second floor where rape was committed on her. She was raped again in night. It appears from the version of the victim that she was raped in daytime as well as in night. If we go with the version of the written complaint then she was taken away by the Appellant in night and was raped in night. Possibility of rape in day time is wiped out. Statements of the written complaint are at variance with the statement of the victim. Of course, the written complaint contains statement of the mother of the victim who derived her knowledge from the victim herself. The statement of the mother is the first in point of time. The victim's statement was reduced into writing and got signed by her. That statement is not produced

and is not known whether first in point of time, as discussed above. But the statements of the victim are at variance with the written complaint.

It is stated in the written complaint that the victim was minor and aged about sixteen years. Ossification test report (Ext.7), which was conducted on 05/11/2008, shows that the age of the victim is between 17 to 19 years. Prosecution did not adduce any document to prove the age of the victim. Except statement of the mother in the written complaint, nothing is there to show that the victim was of sixteen years of age or below that, so that her consent would not be material. In absence of anything else it cannot be decisively stated that the victim was minor at the material point of time.

The statements of the victim may be looked into. In course of evidence she stated that she was taken into the hotel and then in a room situated in the second floor. Thereafter, the Appellant came down to ground floor and again went to the second floor room where food was given to them and they ate the same. Thereafter door of the room was closed and the Appellant committed rape upon her. It is not a case that the victim was wrongfully restrained because no charge was framed in this regard. It is rather stated in the written complaint that the Appellant offered her to go to the second floor. In her statement recorded under Section 164 of the Code of Criminal Procedure the victim stated that when the Appellant took her to the hotel, he asked her to go upstairs. The victim's reaction was she was not willing initially. The question remained open whether he went upstairs in a room of a hotel with subsequent changed mind and willingness? A shadow of doubt is created whether the victim had consent or

willingness or not though subsequently she might have thought otherwise. When the Appellant went downstairs, she had opportunity to go away. The victim stated both in evidence as well as in the statement recorded under section 164 of the Code of Criminal Procedure (Ext.1) that on the next morning when the Appellant went to bathroom, she escaped. The victim's evidence does not describe particulars of the situation, the situation in which she spent in the hotel. Minor omissions and contradictions do not undermine an otherwise reliable and trustworthy testimony of the victim. But the evidence of the victim must not be general or evasive. It must be of such which inspire confidence to rely upon and must allow the Court to understand the situation where she was placed. That clarity must be present, in order to rely upon the sole testimony of the victim. If a situation is assumed that after eating food, the Appellant showed his fang to ravish a helpless victim then also certain doubt remains. Whether after the first commission of rape the victim attempted to run away or asked for some help; whether the Appellant never went to bathroom throughout the day and night so that the victim could get chance to escape; whether the Appellant never left the room keeping the victim alone. All these questions create a doubt in the prosecution case as to whether the victim had consent or not.

P.W.2, the de-facto complainant as well as the mother of the victim stated in cross-examination that they took the course of law since the Appellant and his father did not compensate the victim with money. Medical examination of the victim was conducted on 21/10/2008, ten days after the incident. No injury, either external or in her private part was noted. Medical examination of the

victim was conducted ten days after the incident. Since the Investigating Officer was not examined, it could not be known why there occurred such delay in examination of the victim girl. The medical examination report (Ext.5) does not corroborate the allegation of rape.

Prosecution adduced evidence of witnesses being staff from the hotel (P.W.7, P.W.8, and P.W.9) but their evidence indicates presence of the Appellant on 18/10/2008 without establishing the presence of the victim accompanying the accused. Therefore, depositions of these witnesses do not support the prosecution case.

In trial of rape cases conviction can be based on sole testimony of the victim if such evidence is cogent, reliable and consistent. Medical examination report may corroborate such evidence. It is trite law that in a case of rape it is not essential that courts should look for corroboration of medical evidence. But evidence available must be cogent, reliable and inspire confidence to rely upon. Even sole testimony of the victim can be relied upon. In this case medical examination report does not indicate any rape. Evidence of P.W.7, P.W.8 and P.W.9 do not support the prosecution case, as aforesaid. Only evidence is that of the victim girl, which is different from the written complaint, as stated above. Considering the statement of the victim girl recorded under Section 164 of the Cr.P.C. (Ext.1) together with her oral testimony and even assuming that there was physical relationship between the victim girl and the Appellant, some doubts still remains whether she had consent or not. General statements, as made in this case, without some particularities or specific circumstances do not repel the

clouds of doubts. Such evidence does not inspire confidence to rely upon. The Investigating Officer was not examined leaving no scope to explain certain situations and stirring clear some doubts. The mother of the victim stated in course of cross-examination that since the Appellant did not pay them compensation they have initiated the prosecution. This motive may not demonstrate or indicate lodging of false case but leaves possibility of creating an embellished version or hyperbolic story. This is assumes more significance in view of different versions contained in the written complaint as well as in the statements of the victim.

The Learned Trial Judge failed to appreciate evidence in proper perspective. When the offence is grave like rape, stricter proof is necessary. Sole testimony of the victim girl, in the factual array of the case, which contains gaps and doubts, it is not safe to convict the Appellant on the basis of such evidence.

The entire prosecution case presented is not very cogent and reliable. Although it is consistently stated by the victim that on 11.10.2008 she and the Appellant was in the concerned hotel which could not be shaken in cross-examination, there remains some doubts in the case of the prosecution. In case of doubts, benefit must go to the Appellant and he should be acquitted.

In nutshell, the instant appeal is allowed. The Appellant is acquitted of the charge leveled against him. He is set at liberty and released from the bail bonds.

The instant appeal is disposed of accordingly. Lower court record be returned with a copy of this judgment.

**(Sugato Majumdar, J.)**