

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 1 of 2005

Sri Bibhas Koley

-Vs-

The State of West Bengal

For the Appellant : Mr. Amajit De
Ms. Sakshi Rathi
For the State : Mr. Avishek Sinha
Heard on : 10.08.2023, 09.10.2023, 28.11.2023
Judgment on : 28.02.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 22.12.2004 passed by the Learned Additional Sessions Judge, 2nd Fast Track Court, Hooghly, convicting the appellant under Section 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for seven (7) years and also to pay a fine of Rs. 1,000/- (one thousand),, in default to suffer further rigorous imprisonment for 3 (three) months in connection with Sessions Trial Case No. 56 of 2003.

2. The case of the prosecution in brief is as follows :

- i. On 25.4.1997 at about 22.15 hours the de-facto complainant/prosecutrix lodged a written complaint before the Officer-in-Charge of Chanditala Police Station to the effect that the

de-facto complainant/prosecutrix the daughter of Monimohan Shaw has read upto class nine at Garalgacha Balika Vidyalaya and her father is a Railway employee working at Andal. Her mother's name is Champa Shaw. She has two elder brothers, namely, Prasanta Shaw and Susanta Shaw. She used to live with above mentioned family members in their residence at Garalgacha, Ballavpur, Police Station Chanditala.

- ii. In the year 1987, she was a student of Class Five, the accused named Bibhas Koley only son of Sri Uma Shankar Koley of Garalgacha Harisabha used to follow her every day and tried to introduce himself to her. One day when she protested to it, he threatened her of consuming poison and writing her name in a letter.
- iii. On and from 10.9.1987 love affairs developed in between them and thereafter they wrote letters to each other. Bibhas Koley (accused) took her to his watch repairing shop named "Koley Watch Service" at Jagadishpur for about three to four times. He had also taken her to the house of his friend Indrajit Ghosh at Gobra. At the time of Puja he had taken her to various places on his motor-cycle. Eventually the love affair was disclosed to her elder brother who assaulted her but she kept the relation with the accused intact. The letters were communicated through Suman Shee, Poltu Ballav and Purnendu Santra and the relationship strengthened and Bibhas Koley (accused) promised to marry her.

- iv. On 05.09.1990 at noon in the house of Durga Dutta of Garalgacha Bibhas Koley (accused) ravished her. She was approximately aged about fourteen years and consequently sustained bleeding in her private parts. The further case of the prosecutrix was as a suit was pending in respect of the landed properties her mother generally used to go to Mankundu to the house of her Advocate and the accused committed sexual intercourse with her at her house on such days. At that time Minu Ballav, the wife of Asit Ballav allowed them at her house for free mixing. On the day of Astami of last year Durga Puja in the evening at about 7.00/7.30 p.m the Bibhas Koley committed sexual intercourse with her behind the Siddheswari Auto Service at Kalipore. From 26.12.1996 to 29.12.1996 everyday at about 5.00 p.m. the accused has taken her to sleeping place inside the tea stall of Sankar Das near the Garalgacha School field and enjoyed her physically. Every time the accused used to “*Nirod*” and as a result she did not conceive. The friend of her elder brother named Koley Saw the prosecutrix and accused to enter into shop. Accused every time promised her to marry and for that reason she gave consent by believing him.
- v. Gradually, the local people came to learn the matter of love affairs in between them. Whenever, she requested him to marry, the accused told her that he would marry her at the appropriate time, Last Chaitra (Month according to Bengali Calendar) one girl namely, Raju Ballav of Ballav Para told her that the accused would never

marry her and he ruined the life of another girl previously and when the prosecutrix told it to the accused then he became angry and started to avoid her.

- vi. In the meantime she came to learn that the accused tried to marry another woman. She received an information that the marriage of accused had been settled with one Sumita Das of Masat, who came to know of the love affairs and came to her on 02.04.1997. The prosecutrix had shown the xerox copy of letters written by the accused to her. As a result, the said marriage was postponed and subsequently the accused abused.
- vii. Thereafter, prosecutrix and her elder brothers went to the house of accused and narrated the whole incident to his father and gave a proposal of marriage. However his father drove them out from their house by abusing them in filthy languages. So the prosecutrix lodged the complaint against the accused on the plea that he committed rape upon her by alluring her on promise to marry.
- viii. The investigating officer submitted the charge sheet against the appellant under Section 376/417 of Indian Penal Code and the appellant was duly committed to the Court of Sessions for trial.
- ix. The charges under Section 376/417 of Indian Penal Code were framed against the accused person and the said charges were read over and explained to the appellant. The appellant pleaded not guilty and claimed to be tried.

3. In course of trial the prosecution examined 13 witness and exhibited certain documents, while the defence examined none.

4. Learned Advocate for the appellant submitted that:-

- i. PW-1 being the prosecutrix, had stated that letters were translated wherein Poltu Ballav, Bablu Dey, Sumon Sil acted as peon. She also asserted that this persons were the residents of the same village where she resided. However neither Poltu Ballav, Bablu Dey, nor Sumon Sil came before the Learned Court to support the prosecution case.
- ii. It was also the evidence of prosecutrix that, Bibhas Koley (appellant) having made intercourse with her since 05.09.1990. On 05.09.1990 she was requested by the appellant to go to the house of Durga Dutta of Garalgacha and she went to the house of said Durga Dutta. On that day they enjoyed sexual intercourse for the first time. The most contention of the prosecution case was the having of sexual intercourse between the prosecutrix and the appellant. To prove that fact it was beyond doubt that the prosecution must bring Durga Dutta to depose that really prosecutrix and appellant had occupied their house for the said purposes. But Durga Dutta did not come before the Learned Court to support the prosecution case.
- iii. It was also the evidence of prosecutrix was that, the appellant took her to the house of Indrajit of Gobra and to the house of Minu Ballav of their village for the purpose of sexual intercourse. The irony was

like Durga Dutta neither Indrajit nor Mina Mondal came before the Learned Court to support the prosecution case.

- iv. It was obtained from the evidence of prosecutrix that the appellant took her to the tea stall of Facha for the purpose of sexual intercourse. But just like Durga Dutta, Indrajit, Mina Mondal said Facha came before the Learned Court but did not support the prosecution case.
- v. Champa Rani Shaw (PW-2) in her evidence stated her elder son Prosanta on the date of her deposition was aged about 37 years, her younger son was two years younger than Prasanta i.e. 35 years, after 3 years of her younger son one daughter was born and after one and half year Mithu (Prosecutrix) was born i.e. Mithu's age on the date of deposition of PW-2 was 30 and $\frac{1}{2}$ years. It would be seen that Mithu (prosecutrix) was aged about 17 years on the date from the alleged incidents started to occur as per charge.
- vi. Bibha Raha (PW-8) stated that without going through the Admission Register it was not possible for her to say that the date of birth showing in the certificate was same as to that of the date which was therein the admission register. The admission register was not produced before the Learned Court.
- vii. PW-8 also stated that, the date of birth in Admission Register was forwarded from the Primary School Certificate not from the Birth Certificate. She also stated that it was not written in accordance with Municipal Birth Certificate. According to PW-2 mother of the

prosecutrix statement, she gave birth Mithu at Uttarpa General Hospital which means there was obviously birth certificate issued by Uttarpa Municipality. The Birth Register of Uttarpa Municipality was not produced before the Learned Court. PW-8 further stated that, to get the actual date of birth of any student the recognition certificate of registered institution is necessary. She also stated that, while issuing the certificate, she did not verify the date of birth mentioned in the Primary School Certificate. She further stated that, during her tenure police neither seized the Admission Register nor verified the Certificate with the Admission Register. She also stated that there was no endorsement or initial of Reboti Ranjan Mukherjee in the Certificate, who allegedly wrote the certificate according to the prosecution case. In this regard PW-1 (prosecutrix) in her statement stated that she herself collected the School Certificate as the police asked her.

- viii. S.I. Phoni Bhusan Halder (PW-10) in his evidence stated that *“I have no enquire into the date of birth of victim. I made no prayer for radiological examination of the victim for ascertaining the age of the victim. I made no explanation in the C.D. as to why I did not send the victim for radiological examination. I have not verified the date of birth with the School Admission Register after considering the importance of the said Register”*.

“I did not find any documentary evidence upto 07.05.97 to show that the victim was a minor at the relevant time of incident. I did not Headmistress of Garalgacha Balika Vidyalaya or met with her.”

- ix. S.I Akhil Chandra Bhowmik (PW-11) in his evidence stated like this
“After taking charge of investigation I perused the C.D. including F.I.R on going through the C.D. and relevant papers I thought that I should have to collect the evidence in respect of age of the victim as to whether she was a minor or adult. I also found that the Medical Examination (Clinical) of the victim was done. But ossification test is not done. On 11.05.1997 after taking charge of further investigation I did not make any prayer for ossification test of the victim. I did not collect any birth certificate from the parents of the victim in respect of actual date of birth of the victim during investigation.”

“It is true that the actual date of birth and place has not been mentioned in the statement of the mother of the victim. I have not verified the School Certificate whether it is genuine or not. I have not examined the Headmistress of Garalgacha Balika Vidyalaya. Even I have not verified the School Certificate-in-question before the Headmistress or School Authority. I have not seized the Admission Register of the School concerned.”

- x. From the above, it is clear that the prosecution failed to bring home the charge against the appellant, yet the Learned Additional Sessions (Fast Track) Judge has been pleased to find him guilty thereby convicting him under the sections above referred.

- xi. The appellant had to meet the charge and not the evidence. The prosecution had miserably failed to prove the charge as framed against the appellant and no scope of evidence brought by the prosecution to prove the prosecution case. So the impugned order is bad and liable to be set aside.
- xii. The prosecution made no prayer for radiological examination of the prosecutrix to ascertain the actual age and the investigating officers did not verify the date of birth with the School Admission Register. Not only that, prosecution did not examine a vital witness regarding this case, the father of the prosecutrix. This caste doubt regarding the date of birth or age of the prosecutrix as placed by the prosecution. So the prosecution failed to prove their case and the impugned order of conviction is liable to be set aside.
- xiii. The appellant could not be held guilty on the basis of statement of PW-1 who is unworthy to be believed.
- xiv. The impugned order is bad and liable to be set aside as it is based on total misappreciation of evidence and misconception of law.

5. It was further submitted that:-

- i. From the FIR it had been alleged that complainant/ victim girl had started an affair with the appellant on September, 1989 when she was allegedly 15 years of age. Though the relation had become public but still the victim maintained the relation with the appellant. That allegedly victim established physical relationship with the appellant on 1990 and they continued their

sexual relation on numerous occasions. When appellant refused the proposal of marriage, victim out of personal grudge and to grab the small landed property, own by Appellant in the locality, this complaint was lodged.

- ii. Charge was absolutely defective in this case, as appellant never co-habited with the victim girl without her consent. That in her examination PW-1/Victim clearly stated that she used to exchange love letters with the appellant and enjoyed sexual intercourse with the appellant. Although victim was less than 18 years at the time of physical relationship with the appellant but she was having full knowledge about the consequence/outturn of sexual intercourse.
- iii. Although the family members of PW-1 were well aware about the relation but they never made any complaints to the police station or any other Government authority. That victim, in spite of having knowledge of sexual intercourse was unlawful prior to marriage but still prior to 1996, till the lodging of complaint, victim never made any allegation before anyone. That appellant was the only issue his parents and only solvent person in the family, having quantity of landed property, victim attracted towards appellant and appellant never refused to marry the victim.
- iv. Although PW-3/brother of the victim came to learn about the affair on 25.04.1997 but he never took any steps neither, PW-4,

another brother did not make any enquiry in respect of the love affair in the locality. That PW-5, an independent witness without verifying the matter wrote the complaint and without any specific instruction from the victim and also admitted that this complaint might be lodged by the Victim as because the appellant belongs to different political party.

- v. Astonishingly victim and her family member tried to establish that PW-1 cohabited with the appellant in the tea stall of one Sankar Das/PW-7, though PW-7 did not support the prosecution case and become hostile. That although PW-8/headmistress of Garalgacha Balika Vidyalaya (where victim studied) issued the school certificate of victim mentioned the date of birth as 27.06.1975 at the admission register but it was never produced before the court nor it was tallied with the municipal birth certificate or primary school certificate and moreover the prosecution never verified the concerned certificate (Exhibit-10) with the admission register and also genuineness of the primary school certificate was not verified at any point of time.
- vi. PW-10/investigating officer never made any prayer for Radiological examination of the minor victim for ascertaining her actual age, neither verified the Date of Birth of the victim with the school admission register. Although as an investigation officer of a case under Section 376 of Indian Penal Code, he was well aware of the facts and consequences /importance of such school

admission register. Moreover, he never interrogated the mother and father of the victim regarding the aspect of the date of birth. That another Investigating officer, PW-11 did not collect any birth certificate from the parents of the victim for ascertaining the actual age of the victim neither verified the genuineness of the school certificate nor examined the headmistress of the concerned school.

- vii. PW-12/Gynecologist who examined the victim did not find any marks of injury on any body parts of the victim and opined that victim was habituated for sexual intercourse, also admits that age of the victim can be determined by radiological test which was not done in this present case.
- viii. In this backdrop prosecution completely failed to establish the story of rape against the appellant as prima facie ingredient to constitute the penal offence consent is a determining factor and in this case none of the prosecution witness have stated that appellant cohabited with the victim against her will and in the case of rape one of the vital ingredients/ determinations of age of the victim girl was not at all proved beyond reasonable doubt.
- ix. Motive of filing this false case against this appellant cannot be washed out as appellant and victim girl belong to a different political party as well as completely different caste as per PW-5 and moreover vital witness of prosecution i.e PW-7 did not support the prosecution story.

6. The Learned Advocate for the State in all fairness submitted that the age of the victim could not be proved and it appeared that the relationship between the victim and the appellant continued for a considerable period of time. The brothers of the victim were against such relationship and the victim out of rage and refusal filed the instant case and left to the discretion of the Court.
7. A circumspection of evidence of the prosecution witnesses revealed as follows:
 - i. PW-1 in her deposition stated that she resided at Naiti under P.S. Chanditala and at the time of incident, she resided at Garalgacha Ballavpara under P.S. Chanditala. In the year 1987, she was a student of class V of Garalgacha Balika Vidyalaya. Her father was a retired railway employee. At the time of incident, she along with her two elder brothers and mother used to reside at their house and her father used to stay at Andal at his service place. At that time Bibhash Koley of their village tried to speak with him while she was going to school and one day she resisted him on the way and insulted him then Bibhash Koley stated to him that he loved her and if she did not love him he would commit suicide by taking poison and would write something in a paper in her name for which she would be put in jail. For the above reasons, she was frightened and they gradually came to much closure to each other. Since 01.07.89, he started to write love letter to him and she also gave love letter to him. On 05.09.90, Bibhash Koley requested him to go to the house of Durga Dutta of Garalgacha Vidyalaya and she went there and

Bibhash also came to their house and Durga Dutta gave his house to them and then they were much closure to each other and they were enjoyed the sexual intercourse. Due to such sexual intercourse she sustained bleeding injury on her private parts as she was a minor at that time. Thereafter, he took him to his watch shop. He also took me to the house of Indrajit of Gobra and his friend stated that none was present in that house. But as the boudi of Indrajit was present there and accused Bibhash did not take him to his house by entering into the house. He also used to take him to the house of Mina Mondal of their village for the purpose of sexual intercourse. Bibhash Koley also used to take him to the tea stall of Facha and tried to take him inside the said room with the plea that if her elder brother would see the said incident. Whenever, she used to protest him then he stated to him that if she did not believe him and he satisfied him with the plea that he would marry him after attaining the age of 18 years. At the time of sexual intercourse he used protection so that she might not be pregnant. Poltu, Ballav, Bablu Dey, Puman sil acted as a peon to deliver the letter of Bibhash Koley to him. After attaining the age of 18 years of her age, she requested him to marry her and to meet with him but gradually he sued to withdraw himself from him. Thereafter, she intend to went to P.S. then he threatened him that he already informed the matter to Liluah P.S. and he would see her elder brothers (objected to). She came to learn that the marriage in between Bibhash Koley and

Susmita Das of Masat had already been settled. Then the elder brother of Susmita Das came to their house and she narrated the incident to him and showed him letters and the letters of accused and as a result, the said marriage was not held with Susmita Das. For the above reasons, the accused person used to abuse him with filthy languages whenever they met each other on the way.

Subsequently, her mother and elder brother went to the house of Bibhash Koley and on reaching there his father abused her mother and elder brothers in filthy languages and committed insult to them. Thereafter, his father drove out her mother and elder brothers from his house. Thereafter, she went to P.S. at Chanditala P.S. She showed the letters of accused Bibhash and made allegation against Bibhash and Barababu wrote the allegation and arrested the accused person. Then says Laxmibabu who accompanied him to P.S. wrote the written complaint and thereafter she put her signature on it which was marked Exbt.-1.

Police seized the letter of Bibhash Koley addressed to him. The police prepared the seizure list and she put his signature on the said seizure list marked exbt.-2. The said letters were marked Exbt.-3 series. She produced her school certificate before the I.O. who seized it marked "X" for identification. The police prepared seizure list. His signature on the said seizure list was marked Exbt.-4. She was medically examined at Serampore S.D. Hospital on requisition by I.O. She was produced before the Serampore Court by Chanditala

P.S. and before the Learned Magistrate of Serampore Court. She stated the whole incident and Learned Magistrate recorded her statements in her presence. She put her signature on the said recorded statements marked exbt.-5 series.

- ii. In her cross-examination PW-1 stated that after retirement of her father resides in his house at village Garalgacha. Her father retired from his service in the year 1997 at the time of Durga Puja. She got marriage Suvendu Das and she narrated the incident to him also. Suvendu Das was the brother of the wife of Ranjit Dey. Ranjit Day was the resident of Garalgacha and he was the neighbourer of accused Bibhash Koley. Suvendu Das was involved as carperter and used to stay in the house of Ranjit Dey. She did not know whether Suvendu and her father belonged to same cast or different cast by religion. It took five minutes to reach to school-in-question from her house by walking. Accused Bibhash Koley disturbed him for about two years on the way to her school from their house. For that she became annoyed and she also informed the said annoyance to her parents and brothers. However, her parents as well as her brothers did not take any step by informing the matter either to panchayat or to police station. Her elder brothers accompanied him to school so that the accused might not disturb him. Her brothers also did not inform the school authority to take any step in that matter. Even, she did not request her teachers to take any step in that regard. Her elder brothers all along cautious about her affairs.

It took two minutes time to reach the house of Bibhash Koley from their house. There were many well-wishers of them in their para. Her elder brother and parents did not request to para-people to take any step in that regard. She was not sympathized to Bibhash Koley for the above incident happened for about two years. She narrated the said incident to her friends. But, she could not say their names. It was true that she had wish to marry and she did not state at her house about her intention to marry. Whenever she read in school she had no intention to make sexual intercourse. She knew that without marriage it was not lawful to make sexual intercourse with another. On the very first day of incident of sexual intercourse, she did not state it to her house. After one month of 1st day of sexual intercourse the next sexual intercourse was taken place. Even she did not inform it to her house again. Till the date of lodging the complaint, she could not state the fact of sexual intercourse with the accused to her house. No sexual intercourse took place in a week. Sexual intercourse took place in a month or not in any month. It was not possible for him to say that for how many times the sexual intercourse took place with the accused for the above period. Her mother and her brothers were always cautious about her affairs. She had not been able to show form the letters (exbt.-3 series) that since the year of 1990, the letters were transacted in between her and the accused. It was not evident from the letters (exbt.-3 series0 that on 05.09.90, the sexual intercourse was taken place in between herself

and the accused from the first time in the house of Durga Dutta. The sexual intercourse was taken place in the house of Durga Dutta with the accused for about 5/6 times. The house of Minu Ballav was situated in their para and the house of Minu Ballav was situated beside their house. Minu Ballav stayed at her matrimonial home. Her vasur, ja and others stay in the said house of Minu Ballav. She could not say for how many times accused committed sexual intercourse with him in the house of Minu Ballav. She did not enjoy by sexual intercourse. Then said, she enjoyed it.

The shop of Facha was situated on the said of the road and there are other shops of both sides of the said shops of Facha. In the shop of Facha accused committed sexual intercourse with him for about 2/3 times. About 2/3 months prior to filling the complaint she came to learn that the accused tried to marry Sumita Das. Sumita and his elder brother came to their house and they showed the letters to them and at that time she alongwith her brother and mother was present there. Her elder brothers and mother did not went to the house of the father of accused on that day when they showed the letter to Sumita and her elder brother. She wanted to marry the person who was a solvent person. Bibhash was the only issue of his father. His father has own pacca house and he has a small quantity of landed property. His father was an employee of railway and after retirement he got a lump sum amount of money. Her father was not agreed in respect of marriage in between herself and Bibhash. She

went to P.S. when the father of accused refused the proposal of marriage. Then said, his father did not refuse marriage proposal on 25.04.97. After lodging the complaint, she collected the school certificate ("X" for identification). The police asked him to produce birth certificate. She read upto class IX. She could not remember the year whe she was a student of class IX. Thoe letter written by her addressed to the accused person was marked exbt.-A.

- iii. PW-2 in her deposition stated that Mithu Shaw was her daughter. Bibhash Koley, the son of Sankar Koley developed love affairs with her daughter Mithu Shaw. At the time of incident her daughter was a student of class V and she used to went to school Garalgacha Girls School and whenever she was going to school the accused Bibhash Koley followed her. Whenever her daughter went to take private tuition, accused Bibhash Koley followed her to thre and as her elder son accompanied her daughter, the accused Bibhash Koley stated to her daughter that she was a accompanied by a "body guard". As a result, they were gradually closure to each other and accused stated to her daughter that he would marry her and if her daughter would not agree to marry him he would commit suicide. Thereafter, accused Bibhash Koley took her daughter to his shop of watch at Jagadishpur for 3/4 times on closing day and they resided together there and accused committed sexual intercourse with her. The accused also took her daughter to the house of Durga Das and resided there and committed the sexual intercourse with her. The

accused wanted to marry and requested them to went to his father. They went to his father who closed his door by abusing them in filthy languages. Thereafter, his uncle requested him to take the mother with him in respect of marriage as he took responsibility of the matter. At the time of sexual intercourse the accused used to protection for which Mithu Shaw might not conceive. Ultimately, the accused did not marry her daughter and her daughter went to P.S. At the time of incident her daughter was aged about 12/13 years.

- iv. In her cross-examination PW-2 stated that they were might so by cast. Her two sons and one daughter. Prashanta Shaw was her elder son and Susanta Shaw was the second issue and Mithu Shaw was her third issue. The different of the age in between Susanta and Mithu was about 7 years. Her gave brith Mithu at Uttarpur General Hospital. Her elder son was aged about 37 years. After two years of birth of prashanta, Susanta was born. After three years of birth of Susanta, one daughter was born subsequently. She died and about 1½ years of the birth of the said daughter Mithu was born. We were always cautious about the affairs of her daughter. Prior to went to the house of the father of accused they knew the affairs of Mithu Shaw. About 2/4 days ago prior to went to the house of the father of accused she came to learn the affairs of Mithu Shaw. Mithu Shaw herself stated the incident to them and she verified the said matter among the many people like Durga, Manu and Sankar. She could not remember the date when accused requested them to went to his

father as he was agreed to marry her daughter. About 15/20 days prior to lodging the case Bibhash Koley stated the said statements to them. Thereafter, they informed the matter to Laxmibabu who was the head of the Panchayet. She could not say whether Laxmibabu went to the father of Bibhash Koley. Bibhash had a watch shop and he was acceptable as groom. As the father of accused abused them in filthy languages and as he was not agreed to the said marriage. They became very angry. Then, they narrated the incident to Laxmi polle and then he stated to him to lodge the complaint. Laxmi polle wrote the written complaint. The case was lodged on the very day when the father of the accused drove out them from his house after abusing them in filthy languages. In the evening on the said day they met Laxmi babu. Laxmi babu wrote the complaint at P.S. barababu directed Laxmibabu to write the complaint. Barababu directed Laxmibabu to write the complaint. Immediate before lodging the complaint they did not meet the accused person. She had stated to police that whenever her daughter went to take private tuition before Anil sir and then accused person followed her daughter there and her elder son accompanied her daughter the accused person stated to her daughter that she was accompanied by a body guard. Even, she stated to police that accused person took her daughter to the shop of accused at Jagadishpur for $\frac{3}{4}$ times on closing it or that they resided together there and committed sexual intercourse there. She had stated to police that the accused stated to her daughter that he

would marry her and if her daughter would not agree to marry her she would commit suicide.

- v. PW-3 in his deposition stated that Mithu Shaw was his sister, Mithu Shaw read up to class IX in the school of Garalgacha Balika Vidyalaya. On 25.04.97, she was weeping in there house by sitting and then he along with his mother and brother Susanta Shaw asked the cause of crying. Then, she stated to them that love affair in between her and Bibhash Koley of Garalgacha was developed since 1996-99. Then says, since the year of 1989-96 the love affairs was developed in between his sister and accused Bibhash Koley. From the year 1990 to 96 A.D. Bibhash Koley was moving her and there by motor-cycle along with his sister. He also committed sexual inter course with her by alluring her to marry her, and during sexual inter-course the accused used to protection so that his sister might not conceive. After knowing this incident, he along with his brother went to his father and requested him to get the marriage of Bibhash Koley with his sister. His father then denied the story and drove out us from their house. They narrated the incident to a teacher Laxmi Kanta Polle of there village. He wrote a complaint as per instruction of his sister and his sister lodged the complaint before police station against accused person. The police seized the some letters from the possession of his sister and prepared seizure list. He put his signature on the said seizure list. That was his signature on the said seizure list. That was marked Ext.-6.

- vi. In his cross-examination PW-3 stated that he read up to class IX. His brother Susanta Shaw read up to H.S. His sister had no intention to marry from her childhood. His sister had no eagerness to make sexual inter-course from her childhood. His father stayed in his service place. As his father stayed in his service place. He along with his brother and mother had responsibility to see the safety and security of his sister. They did not take any such precaution in respect of safety and security of his sister. Even, his sister did not state anything to us. On 25.04.97, they came to learn for the first time the love affairs in between Mithu Shaw and Bibhash Koley. Within ten hours on 25.04.97 he came to learn the said affairs. After knowing it they became surprise. Then they decided to take any step in this regard, they did not ask his mother whether she came to learn anything in this regard. They decided to go to his father so that marriage in between Mithu Shaw and accused Bibhash Koley might take place and then about 12 noon they went to the house of accused Bibhash Koley. Then the father of Bibhash Koley drove out them from his house after abusing them in filthy languages. For the above act of the father of accused, they became very angry. After returning home from there they stated the incident to his sister and his sister became furious and went to police station and his sister wanted to file a case against Bibhash Koley. By giving importance to the desire of his sister they went to the police station. They went to police station at about 9/9:30 to 10-00 p.m. It took 15 minutes time

to reach police station from there house by walking. Laxmibabu did not encourage them to lodge the case before police station. Laxmi babu stated to them not to file the case, he would see the matter. At noon, the conversation in between Laxmi babu and them was taken place. Whenever, they went to police station, then Laxmibabu did not accompany them. The police called Laxmibabu at P.S. Before starting a case the O.C. distensile matter with local panchayat members and then starts the case.

Laxmi babu was an influential leader of panchayet and he was elected panchayet member from a party. If they fall in any problem, they inform the matter to Laxmi babu who helps them. Police stated the story of Laxmibabu and took statements of his sister.

- vii. PW-4 in his deposition stated that Mithu Shaw his sister, she was a student of Garalgacha Girls School at the time of incident. In the year 1987 when- ever his sister used to go to school Bibhash Koley disturbed her and gave a proposal for love affairs. The accused Bibhash Koley threatened his sister with the plea that if she did not allow him to make love affairs with her he would commit suicide and he would write her name in a paper and due to such threatening a love affairs in between his sister and accused Bibhash Koley was developed. On 10.09.89, Bibhash Koley fell in love with his sister and due to such love affairs they came to closure to each other gradually. On 15.09.90, they went to the house of Durga Dutta and resided there and committed sexual inter-course each other. On the

day of Astami of Durga Puja in the year 1996 accused Bibhash Koley took his sister to the back side of Siddeheswari Auto Centre and committed sexual' inter-course with her. In the year 1996-95 from 26.12.96 to 29.12.96 Bibhash Koley took his sister to the shop of Facha @ Sankar Das and committed sexual inter-course with his sister there. On several times they also went to the house of Minu Ballav and committed sexual inter-course each other. Purnendu Santra, Poltu Ballav, Suman Sil acted as a peon to deliver the letters written by accused Bibhash Koley addressed to his sister. The accused also promised to marry his sister. He wrote the written complaint as per instruction of his sister and his sister lodged the said complaint before the P.S. The police seized some letters from the custody of his sister and prepared the seizure list in his presence. He put his signature on the said seizure list marked Ext.7. The police also seized the school certificate of his sister and prepared seizure list. He put his signature on the said seizure list also. marked Ext.-B.

- viii. In his cross-examination PW-4 stated that he came to learn the love affairs of Mithu Shaw with accused bibhash Koley for the first time when she was weeping and that day i.e. 25.04.97 when the complaint was lodged before P.S. They did not make any enquiry in respect of the matter in the locality. About 20 days prior to the lodging of the complaint they showed the letters to the elder brother,

uncle of Sumita Das of Masat. His sister placed those letters before Somu Das and her uncle in their presence.

- ix. PW-5 in his deposition stated that he knew Mithu Shaw and his elder brothers and mother of Garalgacha. Mithu Shaw stated to him that accused Bibhash Koley took her various places and committed sexual intercourse with her. Subsequently, accused Bibhash Koley withdrew himself from her and tried to marry another woman. The accused Bibhash Koley did not marry Mithu Shaw. For that reason Mithu Shaw lodged the complaint at P.S. and he wrote the complaint as per her instruction was marked Ext.-9 and the signature was marked Ext.-9/1.
- x. PW-6 was declared hostile by the prosecution.
- xi. PW-7 was declared hostile by the prosecution.
- xii. PW-8 in her deposition stated that she was a retired headmistress of Garalgacha Balika Vidhyala. On 09.05.97, she was headmistress of the said school. On that date, she issued a school certificate of Mithu Shaw, D/o. Sri Moni Mohan Shaw of Garalgacha. In 1994-95, she was a student Class - IX. According to admission register, her date of birth is 27.06.1975. That certificate was written by him the then clerk Rebati Raman Mukherjee and she put her signature on the said certificate which bears the seal of the institution⁴ marked Ext.-10.

xiii. In her cross-examination PW-8 stated that she was a retired from that school from the post of headmistress in the year 1999. Without going through the admission register, it would be possible for him to say that the date of birth showing in that certificate be tallied with the date of birth in the admission register. She did not find any admission register that day before that court. She did not bring the admission register that day before that court. According to primary school certificate the date of birth of the victim was written in the admission register, but not on the basis of birth certificate. The date of birth was not written in ardency municipal birth certificate. It would not be evident from that certificate was issued on the basis of primary school certificate. It was not possible for him to say the date when the primary school certificate was issued. It was not possible for him to say as to whether the date of birth mentioned in the primary school certificate was correct or not. It was true that to get the actual date of birth of any student the recognition of registered institution was necessary. There schools starts from class V. It was not possible for him to say from that certificate which primary school Mithu Shaw admitted in their school. It was not possible for him to say from which day Mithu Shaw admitted in the primary school. She did not make any enquiry in respect of the date of birth mentioned in the primary school certificate. During her tenure the police did not seized the admission register. The police did not verify the certificate (Ext. 10) with the admission register. She was not examined by the

I.O. in respect of the date of birth of Mithu Shaw. No endorsement or initial of Rebati Raman Mukherjee had been mentioned in the Ext.

10. It was not possible for him to say whether Mithu Shaw passed the Class IX examination or not. It was not possible for him to say why Mithu Shaw took the certificate after two years though she was a student of Class IX in the year 1994-95. Mithu Shaw was not well known to him. It was not possible for him to say as to whether Mithu Shaw took the certificate after filing any application.

- xiv. PW-9 in his deposition stated that he was posted at Tarakeswar P.S. as C.I. On 25.04.97, he was posted at Chanditala P.S. as O.C. On 25.04.97, he received a written complaint of Mithu Shaw and on the basis of the said complaint, he started Chanditala P.S. Case No. 87 dated 25.04.97 u/s 376 of I.P.C. against accused Bibhash Koley. Said formal F.I.R. prepared and signed by him marked Ext.-11. His endorsement on the written complaint was marked ext.-9/2.
- xv. PW-10 in his deposition stated that he was posted at Dankuni P.S. as S.I. of police. On 25.04.97, he was posted at Chanditala P.S. as A.S.I. of police. On that date the then O.C., endorsed Chanditala P.S. Case No. 87 dated 25.04.97 to him for investigation. He took up investigation charge of that case. During investigation, he visited the P.O. and prepared rough sketch map with index of the P.O., examined the available witnesses and recorded their statements u/s 161 of Cr.P.C., arrested the accused person and forwarded him before the Learned Court. He sent the victim and the accused for

medical examination. He made prayer before the Ld. S.D.J.M., Serampore for recording statements u/s 164 of Cr.P.C., of the victim. He also seized some letters and prepared seizure list marked Ext. 12. Rough sketch map with index was prepared and signed by him marked Ext.-13. He recorded the statements of witness Poltu Ballav. He stated before him that Bibhash Koley was his friend and Bibhash had been free mixing with Mithu Shaw for about 5/6 years and knowing it her elder brothers assaulted her and then Bibhash used to send letter through him and he delivered the letter before Mithu Shaw. He also stated before him that on his asking Bibhash told him that he would marry Mithu Shaw.

- xvi. In his cross-examination PW-10 stated that he had investigated the various cases for about four years before that case. Prior to start the investigation, the F.I.R. was perused for the purpose of finding out the truth of F.I.R. After going through the evidence, he thought that he had to enquire into the date of birth of victim. He did not pray for radiological examination of the victim for ascertaining the age of the victim. He did not explain in the C.D., as to why he did not send the victim for radiological examination. He had not verified the date of birth with the school admission register after considering the importance of the said register. He did not made any explanation in the C. D. as to why he had not verified the said admission register. It was not a fact that he had not asked the victim to bring the school certificate before him. He did not interrogate the mother of the victim

to the death date of birth or place of birth of the victim. After father of the victim was a vital witness, he did not examine the father of the victim. He did not find any documentary evidence up to 07.05.97 to show that the victim was a minor at the relevant time of incident. He did not examine the headmistress of Garalgacha Balika Vidhayala or met with her. There were houses situated surrounding the house of Durga Dutta. He did not examine them, witness Smt. Champarani Shaw did not state to him that whenever her daughter went to take private tuition before Anil Sir then accused Bibhash Koley followed her to there or that as her elder brother accompanied her daughter the accused Bibhash Koley stated to her daughter that she accompanied by a "Body Guard". She also did not state before him that accused Bibhash Koley took her daughter in the shop of accused at Jagadishpur for 3/4 times on the day of closing it and that they resided together there and committed sexual inter-course with Mithu Shaw there. She had not stated to him that the accused stated to her daughter that he would marry her and if her daughter would not agree him to marry him she would commit suicide. A Witness Susanta Shaw did not state before him that from 26.12.96 to 29.12.96 accused Bibhash Koley took her sister to the shop of Facha @ Sankar Das and committed sexual inter-course with her there. He did not state before him that accused Bibhash Koley tried to marry one Sumita Das of Masat by registration without her relatives and the uncle of Sumita Das came to their house and they

showed the letters of accused Bibhash Koley to them. Susanta Shaw also did not state before him that accused Bibhash Koley threatened his sister with the plea that make if she did not make allow him to love affairs with her he would commit suicide and he would write her name in the paper and due to such threaten the love affairs in between the parties was developed. Witness Laxmi Kanta Polle did not state before him that after withdrawing himself from Mithu Shaw, the accused Bibhash Koley tried to marry another woman.

- xvii. PW-11 in his deposition stated that he was posted at Arambagh P.S. as S.I. of police. On 11.05.97, he was posted at Chanditala P.S., an S.I. of police. On that date Chanditala P.S. Case No. 87 dated 25.04.97, he further endorsed that case to the then O.C. for investigation. During investigation, he collected medical reports of victim and accused, collected copy of statements u/s 164 of Cr.P.C., of the victim and seized school certificate produced by complainant and prepared seizure list and signed by him marked Ext.-14. On 14.05.97, he made prayer before the Ld. S.D.J.M. Serampore for obtaining specimen handwriting of the accused and before Ld. Magistrate the accused refused to give his specimen hand-writing on 23.05.97. He also collected the copy of the said Order. After completion of investigation, he submitted charge-sheet u/s 417/376 of I.P.C. against accused Bibhash Koley.
- xviii. In his cross-examination PW-11 stated that after taking charge of investigation, he perused the C.D. including F.I.R. Ongoing through

the C.D. and relevant papers, he thought that he had to collect the evidence in respect of age of the victim as to whether she was a minor or adult. he also found that the medical examination of the victim was done. But, ossification test was not done. On 11.05.97, after taking charge of further investigation, he did not make any prayer for ossification test of the victim. He did not collect any birth certificate from the parents of the victim in respect of actual date of birth of the victim during investigation. He had think that the parents of the victim was the competent person to say the actual date of birth and date of place of the victim. He did not examine the parents of the victim during his investigation. It was true that the actual date of birth and place had not been mentioned in the statement of the mother of the victim. He had not verified the school certificate whether it was genuine or not. He had not examined the headmistress of Garalgacha Balika Vidhayala. Even, He had not verified the school certificate-in-question before the headmistress or school authority. He had not seized the admission register of the school concerned. Even, he havd not verified the school certificate-in-question with reference to the admission register. No explanation had been given in the C.D. as to whether he did not examine the head-mistress of the school verifying concern evirated the school certificate with reference to the admission register and genuineness of the school certificate. After refusal of the accused to give specimen hand writing he did not the collect any standard of hand writing of

accused for purpose of examining it by hand writing expert. Manuscript of accused like khata, accounts book in his office shop in the standard hand writing of the accused.

- xix. PW-12 in his deposition stated that he was posted at Nabadeep State General Hospital in the District of Nadia as Medical Officer of Gynaecologist. On 28. 04.97, he was posted at Serampore Walls Hospital, Hooghly as M.O. of Gynaecologist. On that date he examined Mithu Shaw, D/o. Moni Mohan Show of Garalgacha, Ballavpur, P.S. Chanditala, Hooghly, with reference to Chanditala P.S. Case No. 87 of 25.04.1997 u/s 376 of I.P.C. The victim girl was aged about 22 years. Constable No. 1497 Ratan Dey, brought the patient and identified her before him. He examined the girl on 28.04.97 at 1 p.m. at operation theatre in presence of sister Bina Chowdhury. No marks of injury was detected on her private parts or over breast. Hymen was absent. She was habituated for sexual intercourse. The said medical report prepared and signed by him was marked Ext.-15.

8. In ***Maheshwar Tigga v. State of Jharkhand***¹, the following was held by the Hon'ble Supreme Court:-

20. *We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which*

¹ (2020) 10 SCC 108

according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] are considered relevant : (SCC p. 58, para 25)

“25. ... It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.”

9. The following was held by the Hon’ble Supreme Court in **Naim Ahamed v. State (NCT of Delhi)**².

17. Again in *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra (supra)*, this Court interpreting the Section 90 and the Clause - Secondly in Section 375 of IPC, observed as under:—

“23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether

² 2023 SCC OnLine SC 89

the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.”

10. The document marked as Exhibit-10 appeared by the school certificate issued in favour of the victim stating the victim to be a student of class- IX during the session of 1994-95. The date of birth of the victim was recorded to be 27th day of June, 1975 according to the admission register. The admission register was not produced before the Court.
11. The aforesaid certificate was issued on 09.05.1997 by the Head Mistress who deposed before the Court as PW-8 stating that the certificate was written by the clerk Reboti Raman Mukherjee and the same was signed by her along with a seal of the institution.
12. The complaint was lodged on 25.04.1997. The victim prosecutrix alluded to have been in a relationship with the appellant since 10.09.1997 when she

was a student of class-V being 12 years of age with regard to the school certificate as aforesaid. The prosecutrix continued the relationship with the appellant for a period of 10 years beyond the date of her attaining majority and did not divulge to anyone to have been sexually molested on repeated occasions. The minority of the victim at the relevant date could not be proved through proper documentation. The birth certificate was not produced by the school authority. Neither the admission register was produced mentioning the date of birth to corroborate the certificate issued by the school. The Head Mistress was only a signatory to the certificate written by somebody else without personal knowledge of the same. Since the victim claimed to have been in the relationship with the appellant for a period of 10 years from 1987 till 1997 from the stage of being a minority to the date of being a major. The victim prosecutrix admitted to be in a consensual relationship with the appellant being aware of the consequences of the refusal to marriage. The letters marked as Exhibit 3, 3/1, 3/2, 3/3, 3/ 4, 3/5 and 3/6 did not mention the date of the inception of relationship and its termination. The victim and the appellant were in a relationship in secret without the knowledge of the family members of either of the parties.

13. The initial relationship between a couple appears to be blissful and raptures which gradually owing to differences and disagreements may evolve to be fragile. Such differences and disagreements can be attributable to either of the parties. A disgruntled party occasionally ends up being revengetic as well as destructive. In the instant case the actual age of the victim could not be proved. The repercussion and physical relationship of the

victim could not have been beyond her knowledge and perception. The victim mentioned to have visited different places with the appellant and visibly in the presence of others who assisted in their privacy. The victim was reprimanded by her brothers for being recalcitrant to their dishonour.

14. She was assaulted to her dismay. The promise to marry a minor victim cannot be a fair deal. Since the marriage of a minor is not sustainable under the law. The victim stated to be in a relationship with the appellant for approximately ten years prior to the complaint. Presumably the victim attained the age of majority many years prior to the incident alleged. The victim was not under any misconception of the promise to marry as repudiation to the same might not entail indictment owing to the consent to the physical relationship granted by the victim. Criminal jurisprudence must not be a weapon to combat personal grudge and animosity more so deprecating under the disguise of an offence under Section 376 of the Indian Penal Code, which is devastating and heinous. It disintegrates a girl/woman's dignity, emotions, growth, both mental and physical into pieces. The experience undergone by the victim in reality must be inexplicably horrific and ruthless. An offence under Section 376 of the Indian Penal Code is not a flippant and frivolous act to be used as a machinery for unreasonable and insensitive retribution.

15. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.

16. The judgment and order of conviction dated 22.12.2004 passed by the Learned Additional Sessions Judge, 2nd Fast Track Court, Hooghly, in connection with Sessions Trial Case No. 56 of 2003, convicting the appellant under Section 376 of the Indian Penal Code is set aside.
17. Accordingly, the instant criminal appeal being CRA 1 of 2005 stands disposed of.
18. There is no order as to cost.
19. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
20. 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.)