

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 96 of 2001

Saifur Rahaman

-Vs-

The State of West Bengal

For the Appellant : Mr. Subir Banerjee
Mr. Sandip Bandyopadhyay
Ms. Ruxmini Basu Roy

For the State : Ms. Faria Hossain
Ms. Mamata Jana

Heard on : 06.12.2023

Judgment on : 07.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 8.2.2001/9.2.2001 passed by the Learned Sessions Judge, Uttar Dinajpur, at Raiganj, in Sessions Case No. 88/99 (Sessions Trial No. 37/99) convicting thereby the appellant under Section 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for a period of 4 years and 3 months and to pay a fine of Rs. 5,000/- in default to suffer simple imprisonment for 3 months more.
2. The prosecution case was initiated on the basis of a complaint which precisely stated that the victim was forcibly grabbed from behind by the

appellant while she was working at the field and thereafter raped in a paddy field.

3. There was a delay of two days to file the aforesaid complaint as the amicable settlement between the parties failed to fructify.
4. Based on the written complaint, P.S. Case No. 88/96 dated 28.11.96 under Section 373/323 of the Indian Penal Code was initiated.
5. Investigation resulted in submission of the charge-sheet based on which charges were framed to which the appellant pleaded not guilty and claimed to be tried.
6. The prosecution to prove its case examined 12 witnesses and exhibited certain documents as exhibits.
7. The Learned Advocate for the appellant submitted that :-
 - i. The Learned Sessions Judge erred in law and in fact in not considering and relying on the evidence of PW-9, Dr. Narayan Chandra Bhowmick, who examined the victim girl Momina Khatun (PW-1). P.W-9, Dr. Bhowmick opined that he had not found any definite proof of rape. P.W.-9 also did not find any foreign body or injury mark on the private parts of the victim i.e. P.W.1.
 - ii. The Learned Judge should have considered the Medical Report of Dr. Narayan Chandra Bhowmick, P.W-9, who after examination of the victim girl came to the conclusion that clinically he had not found any definite proof of rape.
 - iii. The Learned Judge also erred in law and in fact in not considering the report of the Dr. Arabinda Chakraborty (PW-10) who examined

the vaginal swab of the victim girl and opined that smear did not reveal the presence of spermatozoa.

- iv. After considering the opinions and evidences of the P.W-9 and P.W-10, the Learned Judge ought to have passed an order of acquittal of the accused holding that the charge under Section 376 of Indian Penal Code has not been proved at all.
- v. The delay in lodging the complaint and/or accepting the alleged story of 'Salish', tried to be established by the prosecution witnesses to be a cause of delay in lodging the said complaint should not have been accepted in as much as from the evidence of PW-12, S.I. Phani Bhusan Das, the Investigating Officer, it was evident that not a single witness stated before him at the time of recording the statements under Section 161 of the Code of Criminal Procedure that a 'Salish' was held on the date of the alleged occurrence and the accused took two days of time for settling the dispute.
- vi. Although the complaint was lodged on 28.11.96 but the Investigating Officer (PW-12) visited the residence of the complainant on 25.11.96, the day on which the alleged offence took place and purportedly advised the complainant's family members to settle the alleged dispute. In view of the above specific evidence it was evident the Police started the investigation before registering the F.I.R. in connection with the alleged offence and therefore the First Information Report hits under Section 162 of the Code of Criminal Procedure.

- vii. In the First Information Report there was no averment or allegations that the victim girl was kidnapped by the accused-appellant by tying her mouth by a piece of cloth but in the evidence the prosecution had tried to develop their case through the mouth of P.W-13 and other interested witnesses that PW-1 was kidnapped and taken away after tying her mouth by a piece of cloth by the accused/appellant.
- viii. The PW-4, the wife of PW-3 deposed before the Court that her husband reported the incident. If the said statement was taken to be true as it had been proved that the complaint lodged by the PW-1 on 28.11.96 is not the First Information Report as claimed by the prosecution and the above fact was also supported by the prosecution witnesses themselves who deposed before the Court that the Investigating Officer came to the residence of the complainant in the evening of 25.11.96, the day on which the alleged offence took place.
- ix. The prosecution witnesses themselves admitted that they asked the accused to marry the PW-1 or to pay them a sum of Rs. 20,000/- to Rs. 25,000/- and since the accused did not fulfill their demand, on 28.11.96 the purported complaint was lodged against the accused under Section 376/323 of the Indian Penal Code.
- x. The long pending disputes between the family of the accused-appellant and the family of the complainant and other interested witnesses who supported the alleged case of the complainant should have been considered.

- xi. To convict the accused the Learned Judge relied upon the report of the Forensic Expert (Ext.7) but failed to consider that the items of the said report did not tally with the items of which were sent for the examination.
- xii. From the evidences of the prosecution witnesses as well as the Investigation Officer, it appeared that the Police seized a pink (Golapi) coloured panty of the victim girl and the same was sent for examination to the F.S.I. From the examination report of the F.S.L (Ext.7) it appeared that the F.S.L. Expert received and examined a saffron coloured panty which was not sent for examination.
- xiii. The long delay in sending the wearing apparels of the victim girl to F.S.L cast serious doubt about the result of the report in as much as from the evidence I.O. it was evident that the I.O. sent a pink coloured panty for examination but as per the report of F.S.L., the Expert examined one 'Saffron' coloured panty which was not sent for examination.
- xiv. The prosecution had not examined any independent witness in the present case and the witnesses who were examined in this case were highly interested witnesses and close relatives of the PW-1.
- xv. The Learned Judicial Magistrate who purportedly recorded the said statement had not been examined to prove the said statement.
- xvi. On a total assessment of the evidence on record the Learned Judge ought to have held that the prosecution had not been able to bring home the charge beyond all reasonable doubt.

- xvii. The Learned Judge over-looked the contradiction amongst the prosecution witnesses which went to the very root of the prosecution case and made the same untrustworthy.
 - xviii. The evidence of the prosecution witnesses in Court differed substantially from the statements made before police during the investigation not on minor details but on important aspects and the same had made the entire prosecution case untrustworthy.
 - xix. The Learned Judge ought to have held since the complaint was lodged after a long delay and the same was not explained, the probability of concoction of facts cannot be ruled out and accordingly the appeal shall be allowed.
8. The Learned Advocate for the State submitted that the appellant was caught red handed from the spot by the PW-3 the brother of the victim. Based on corroborated evidence, the prosecution has been successful to prove its case and therefore the appeal should be dismissed.
9. A circumspection of the prosecution witnesses revealed as follows:-
- i. PW-1 stated that she could not cry because the accused already bound her face with cloth and immediately after her elder brother had returned to house taking cattle with him raising alarm hat-hat and on hearing the voice of her elder brother Nasiruddin the accused allowed him to go and then she met her brother Nasiruddin and told him that the accused Saiful forcibly raped her. On hearing this her elder brother asked her where the accused was and she had shown the accused and her elder brother found the accused sitting there

bowing his head and her elder brother caught hold of the accused and proceeded towards their house with the accused and on the way father of the accused and brother of the accused forcibly snatched the accused from the custody of her brother Nasiruddin. After returning home her elder brother narrated the incident to her father Samsuddin and her uncle Mojibur Rahaman and Fasir Ali.

She further deposed that after receiving complaint from her Darogababu sent her to Raiganj District Hospital for medical examination. She made a statement under Section 164 Cr.P.C. before a Judicial Magistrate. She narrated the incident to her brother, her brother's wife (baudi), parents, uncles and many others.

Darogababu seized green coloured frock and gown commonly known as two – part and one green coloured veil (orna) and one “pink coloured pant” under a seizure list.

- ii. In her cross-examination PW-1 stated that *‘now this practice was going since after this case. She was detained by the accused for 5 to 7 minutes. The aforesaid period taken in between apprehending her as well as reporting by him to her brother. she went to Kalai field along with her father at 2 p.m. Then says she went to Kalia field at 10 a.m. and the occurrence took place at 2 p.m. There was abrasion and lacerated injuries in some parts of her body due to dragging her by the accused from the Kalai field to the P.O. i.e., near the tank-bank. She was harvesting riped Kalai. She returned to her house along with her brother walking. Her brother was following her with the accused.*

Not a fact that she did not state in her F.I.R. that Saifur tied my mouth by a piece of cloth. Not a fact that she have not stated in her F.I.R. that on seeing her brother coming she rushed to him and stated that Saifur committed rape on him. ... Not a fact that as she refused to file this case falsely, there was delay in lodging this complaint. Police came in the evening of that. Herself, her brother, her uncle had been to the P.S. on the next day of shalish police came to their house in the morning. The shalish held on the very day of incident in the evening. Not a fact that we also tried to create pressure on the accused through police from him. Not fact that a long standing litigation was pending between her father and the father of the accused. Not a fact that she was afraid of detection in medical examination for which there was delay in lodging the complaint. Not a fact that my entire evidence was false.'

- iii. PW-3 in his deposition stated that he immediately rushed to the paddy field when he found Saifur Rahaman sitting there with his head down. He apprehended Saifur and tried to take him to their house. On the way Saifur's father Kafiluddin and his brother Latifuddin snatched away Saifur from his clutch. He reported the incident to his father and other members of his family as well as to the headman of the locality who called a shalish.
- iv. In his cross-examination PW-3 stated that he did not notice any mark of injury in the body of his sister. His sister returned to the house walking. He was following her along with Saifur. While he was taking

Saifur there was no one at the place. PW-3 further stated that litigation is pending between Fayar Bux and Kofiluddin.

- v. PW-4 in her deposition stated that she stated to Daroga Babu that PW-1 stated to her that on hear the voice of her brother who was coming back with the cattle's from the field, she fled away towards the house from the paddy field.
- vi. PW-5 in his deposition stated that a shalish was held in their village when the accused party took two days time. The shalish was attended by many persons including Fayer Bux, Chain Hussain and many others. As the accused party refused to accept the verdict of the shalish PW-3 and PW-1 went to police station. He did not go to the police station. Saifur was present in court that day.
- vii. PW-5 in his cross-examination stated that since 2/3 years litigation was going between Kofiluddin and him. No resolution could be adopted in the shalish. The victim party tried to resolve the dispute by amicable settlement but the accused party did not agree though one of the accused was panchayat member.
- viii. PW-10 in his deposition stated that in vaginal swab report smear showed no spermatozoa present. The report was signed by him and countersigned by Superintendent of Raiganj District Hospital.
- ix. PW-12 in his cross-examination stated that in the report all the answers were found to be negative. There was no note in the case diary as to how the seized wearing apparels were kept in their Malkhana. No note in the case diary as to what condition the wearing

apparels were received back by him. He seized one 'golapi' (pink) coloured panty but the panty which was seized for chemical examination was saffron colour. He did not enquire as to why the saffron colour panty for F.S.L. examination though he seized 'golapi' (pink) coloured panty. He sent the wearing apparels through S.D.J.M. under packed condition with case reference thereon. That was the copy of the challan (Exbt-A). He did not send separately any memorandum containing the specimen seal to the F.S.L. Expert. PW-12 further stated that PW-3 Nasiruddin Md. did not state to him that the accused closed the mouth of his sister by piece of cloth. PW-12 further stated that PW-4 Nurbanu Khatun did not state to him that Monema Khatun a victim girl stated that she told about the incident to her brother. Nurbanu did not state to him that she learnt about the incident from her husband. Pw-5 did not state to him that accused party prayed 2/3 days time from the panchayet. PW-5 did not state to him that he learnt the incident from PW-1 and PW-3. PW-6 did not state to him that PW-1 and PW narrated the incident to him.

10. PW-1 the victim during her examination-in-chief mentioned that the Darogababu had seized the green coloured frock and gown commonly known as 'two part' and one green coloured veil (orna) and one pink coloured pant under a seizure list which were marked as MAT Exhibit 1 collectively.
11. The aforesaid garments were seized on 28.11.96 at 11:55 hours after a lapse of three days and as per the report of the serologists marked as Exhibit 7 collectively, the report dated 9/4/97 stated the gown to have been stained

with human semen. However, the group of stains could not be determined for insufficient of item no. 2 for test. Spermatozoa had been detected on the relevant semen stains on gown marked A. However, no such semen could be detected on the saffron coloured elastic fit ejar marked B which bore yellow stains over the lower bottom portion.

12. The F.S.L. report with regard to the aforesaid examination was not conclusive with regard to the presence of spermatozoa belonging to the appellant. Moreover, the examination as aforesaid was conducted on the basis of a saffron coloured pant instead of a pink coloured pant seized by the Investigating Officer.
13. The medical report marked as Exhibit 5 did not mention any injury marks on the private part of the victim. Further no foreign body was noticed to be present in the private part of the victim. The ossification test report marked as Exhibit 8 collectively denoted the age of the victim to be more than 15 years and less than 17 years.
14. There has been deviations and omissions in the evidence of the victim, i.e. PW-1, as well as her brother PW-3. Admittedly there had been a dispute between both the parties which established an acrimonious relationship between them.
15. PW-3 in his cross-examination stated if the appellant was ready to marry his sister, i.e. PW-1 and fulfilled a demand for a cash of Rs.20,000/- to Rs.25,000/- in case the appellant did not marry the victim as compensation the complaint would not have been lodged by the victim.

16. PW-4 moreover submitted during his cross-examination that he did not notice any mark of injury on the body of his sister, i.e. the victim PW-1 who returned along with him to the house walking followed by the appellant Saifur. While PW-3 was taking Saifur, there was none at the place.
17. He further admitted that the litigation was pending between Fayar Bus @ Bux and Kofiluddin.
18. A brother for PW-3 to have learnt that the sister the victim PW-1 had been raped by the appellant would have instinctively reacted instantly.
19. In the instant case the behaviour of PW-3 was uncanny and weird. He accompanied the appellant and the victim silently to the house and therefore reported the incident for a 'shalish' for an amicable settlement of the issue.
20. PW-3 may have tried to safeguard the interest of the victim from social repulsion and refrained from raising hue and cry over the incident. However, with further phase of incident such stance on the part of the PW-3 is improbablized by his deposition in the cross-examination where he stated to have working at a long distance from the 'Kolai' field while PW-1 was working. The statement of the victim recorded under Section 164 of the Code of Criminal Procedure, the complaint and her deposition before the Court raised suspicion with regard to the presence of the appellant at the spot.
21. It was stated that the appellant was sitting at the spot after the commission of the offence bowing his head and did not leave the spot instantaneously of the PW-3 who occasioned to have arrived at the place of occurrence traversing a long distance which raises doubt with regard to the credibility of his presence at the spot. Moreover, there was no independent

witness to have seen PW-1, PW-3 and the appellant walking altogether after the appellant was caught by the PW-3 for having committed the offence.

22. The lack of corroborative evidence and element of enmity between the parties and failure on the part of the prosecution to prove the genuinity of the seized Alamats sent for F.S.L. examination and the inconclusive report of the F.S.L. examination fail to justify the prosecution case beyond reasonable doubt.
23. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.
24. Accordingly, the criminal appeal being CRA 96 of 2001 stands disposed of.
25. There is no order as to costs.
26. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
27. 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.)