

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 104 of 2018

Firoj Sk.

Vs

The State of West Bengal & Anr.

For the Appellant	: Mr. Arnab Chatterjee, Mr. Anisur Rahaman, Ms. Dhanasree Biswas, Ms. Paulami Bose.
For the State	: Mr. Nguive Ahmed, Ld. APP Ms. Amita Gaur.
For the Opposite Party No. 2	: None.
Hearing concluded on	: 01.03.2024
Judgment on	: 08.04.2024

Shampa Dutt (Paul), J.:

THE APPEAL

1. The present appeal has been preferred against a judgment of conviction dated 12th of January 2018 and order of sentence dated 15th of January 2017, passed by the Learned Additional Sessions Judge, 1st Fast Track Court at Berhampore, Murshidabad in Sessions Serial No. 24 of 2013 (1489 of 2014) relating to Sessions Trial No. 3 (02) of 2013, corresponding to G.R. Case No. 3394 of 2012, arising out of Beldanga Police Station Case No. 408 of 2012, dated 3rd of August 2012, thereby convicting the present appellant for committing offences under Sections 448/376 of the Indian Penal Code 1860 and sentenced him to suffer Simple Imprisonment for Seven years and to pay a fine of Rs. 1,50,000/- in default to suffer Simple Imprisonment for one year.

THE PROSECUTION:-

2. Beldanga P.S. Case No. 408/12 dated 03.08.2012 was initiated for offence punishable under Sections 448/376 IPC, against the appellant alleging as follows:-

“My husband was a caretaker of Bhabta Dak Bungalaow. After death of my husband, I along with my two daughters had been living in that Dak Bungalow. On 03.08.2012 at about 11.00 A.M., I went to Berhampore and my one daughter Chumki Mandal went to School. At that time my daughter Tuku Mandal (aged about 22 years) was alone in the room, when

Firoj Sk., S/o Ajil Sk., Vill- Bhabta, Boltala Para, P.S. Beldanga, Dist. – Murshidabad entered into her room after crossing the boundary wall of Dak Bungalaow. Then, he caught hold my daughter and raped her against her will forcibly. As I was out of house it became so late to file the complaint.”

3. The prosecution has examined seven witnesses, including the victim.
4. Documents exhibited include the medical reports.

ANALYSIS OF EVIDENCE:-

5. Prosecution Witness (P.W.-1) is the de facto complainant and mother of the victim. She has reiterated her case as made out in the written complaint and has admitted filing the written complaint.
6. Prosecution Witness (P.W.-2) is the victim. She has categorically stated that she was raped by the Appellant Firoj Sk., when she was alone in her house.
7. During cross examination, the victim has stated as follows:-

“I know the accused for the last 10/11 years. The accused used to tell me that he loved me. He used to love and embrace me for said 10/11 years. Whenever he used to get myself alone, he kissed me and embraced me for the said period. When the accused entered into our residential area by crossing the boundary wall I was in Varanda of our house. He then proceeded towards me with smiling face. Then he embraced me. At that time his hands were in my back and my hands were also in the back of the accused. Then he kissed me. We spent that moment about three minutes. Then the accused took off my Churidar and Kamiz. The accused did not press my breast (volunteers) – He pressed my mouth. At that time my sister did not

return from school. She used to return at about 2:00/2:30 p.m. from school. Accused fled away from my house before 2:30 P.M. I did not give any threat to the accused. He fled away as the time of returning of my sister and mother was ensuing.

Not a fact that no incident of rape was occurred.

There was a discussion with my mother with regard to the contents of my deposition.

I made statement to the Magistrate as tutored by police.

Whatever I was tutored by my mother I have stated the same in my deposition.”

8. Prosecution Witness (P.W.-4) is the sister of the victim. She has also stated about the alleged rape.

9. Statement under Section 164 Cr.P.C. has been proved (Exhibit-3).

10. Prosecution Witness (P.W.-9) is the doctor who examined the victim on 04.08.2012. **The victim was aged about 22 years at the time of incident.** The opinion of the Doctor is as follows:-

- 1. “It is difficult to opine whether she was raped or not,*
- 2. It is also difficult to find whether she is sexually assaulted but she was found accustomed of sexual act,*
- 3. No foreign body was detected in her vagina,*
- 4. U.S.G. of lower abdomen was advised for detecting any foreign body in uterus,*
- 5. Hymen seen was absent.”*

11. The medical report is marked Exhibit 5.

12. Written Argument has been filed on behalf of the petitioner.

13. The following judgments have been relied upon by the Appellant:-

- i. Ganesh Bhavan Patel vs State of Maharashtra, LAWS(SC)-1978-10-20, decided on October 18, 1978.*

- ii. *Uday vs State of Karnataka*, LAWS(SC)-2003-2-16, decided on February 19, 2003.
- iii. *Dilip vs State of Madhya Pradesh*, LAWS(SC)-2001-10-72, decided on October 09, 2001.
- iv. *Naim Ahamed vs State (NCT of Delhi)*, 2023 LiveLaw (SC) 66, decided on 30.01.2023.

14. Prosecution/State, submit that, in this case there was a false promise to marry, but there is no such statement in the written complaint.

15. The Supreme Court in:-

- i. *Kuldeep K. Mahato Vs State of Bihar*, decided on 06.08.1998, held:-**

“Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of prosecutrix being truthful held that the appellant has forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya shankar Thakur - P.W.2 also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. there is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant.”

ii. In K.P. Thimmappa Gowda Vs State of Karnataka, in Criminal Appeal No. 1499 of 2004, decided on April 4, 2011, the Supreme Court held:-

“6. The trial court accordingly held that there was no rape as Rathnamma was above 16 years of age and had consented to the act. Subsequently Rathnamma gave birth to a female child on 25.1.1996.”

16. In the present case:-

- 1) The victim was **22 years old** at the time of the alleged incident.
- 2) Though **there is no case of false promise to marry**, the victim as P.W. 2 has admitted that they had a relationship for about 10/11 years. They also used to kiss and embrace each other.

17. In her cross examination, the victim has admitted that when the accused entered her house by crossing the boundary wall he went to her with a smiling face. They embraced and kissed for about three minutes.

18. The victim has also admitted that she did not threaten the accused/appellant.

19. The accused fled away when the victim's mother and sister were to come home.

20. All this, while the victim did not raise any alarm nor resist the accused. It appears that they had a love affair as the victim has stated that the accused told her, he loved her.

21. For the 10/11 years of relationship, there has been no show of any resistance on the part of the victim.
22. The doctor who examined her and the medical report shows that the victim is accustomed to sexual Act, Hymen seen absent and there is no note of any injury. The doctor noted that it is difficult to opine if she is sexually assaulted.
23. As such there is no materials or evidence to show that the victim was subjected to forcible intercourse nor is there any evidence to show that there was any resistance offered by the victim. The victim at the relevant time was aged about 22 years.
24. **Thus it is clearly a case of consensual relationship.**
25. None of the ingredients as required to constitute an offence under Section 375 of IPC punishable under Section 376 of IPC, has been proved in this case against the appellant.
26. The findings of the trial judge are thus clearly not in accordance with law and also not on proper appreciation of evidence and thus the judgment of conviction dated 12th of January 2018 and order of sentence dated 15th of January 2017, passed by the Learned Additional Sessions Judge, 1st Fast Track Court at Berhampore, Murshidabad in Sessions Serial No. 24 of 2013 (1489 of 2014) relating to Sessions Trial No. 3 (02) of 2013, corresponding to G.R. Case No. 3394 of 2012, arising out of Beldanga Police Station Case No. 408 of 2012, dated 3rd of August 2012, thereby convicting the present

appellant for committing offences under Sections 448/376 of the Indian Penal Code 1860 and sentenced him to suffer Simple Imprisonment for Seven years and to pay a fine of Rs. 1,50,000/- in default to suffer Simple Imprisonment for one year, **is hereby set aside.**

27. CRA 104 of 2018 is allowed.

28. Accused is acquitted of all charges and discharged and also released from his bail bond.

29. All connected applications, if any, stand disposed of.

30. Interim order, if any, stands vacated.

31. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

32. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)