

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 103 of 2021

With

CRAN 1 of 2021

With

CRAN 3 OF 2022

Krishnapada @ Kesto Sutradhar

-vs.-

The State of West Bengal & Anr.

For the Appellant : Mr. Sohan Lal Adak

For the State : Mr. Debasish Roy, Ld. P.P.,
Mr. Saryati Datta,
Ms. Rajnandini Das.

Reserved On : 26.07.2024

Judgement On : 23.08.2024

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 22.02.2021 & 23.02.2021 passed by the Learned Additional Sessions Judge, 1st Court, Malda in Sessions Trial No. 07/2015 arising out of Sessions Case No. 301/2014, thereby holding the

appellant guilty for commission of offence under Section 376 of Indian Penal Code, 1860 and directing him to suffer rigorous imprisonment for 7 years and fine of Rs. 10,000/- in default to suffer rigorous imprisonment for 6 months.

Habibpur Police Station Case No. 106/14 dated 31.05.2014 was registered for investigation under Section 376 of IPC on the basis of an information/complaint submitted by the informant/victim 'X'. The victim being childless, decided along with her husband to call a Kabiraj (Practitioner of indigenous medicine). After coming to know regarding the accused associated with such profession, he was asked by her husband to perform the same and on 27.05.2014 in the morning at about 9.00 A.M. he visited the informant's house. After arriving the accused represented that two ladies/women would be required, accordingly the informant called his sister-in-law (brother-in-law's wife) namely Minu Tudu. The accused initiated his ritual in her husband's room through the brother-in-law's wife, when the informant and others stood at the balcony. After completion of ritual her sister-in law came out, and she (victim) was called inside. At about 10.30 A.M. her husband left for his job, leaving behind her sister-in-law, who kept waiting at the balcony. Taking advantage of her husband leaving for his duty/job, the accused threatened her, gagged her mouth and raped her by forcing himself. The accused thereafter fled away. Unable to bear the suddenness of the incident, the informant became distressed and initially did not divulge the same, however belatedly she disclosed the incident to her husband. She therefore, prayed for legal action against the accused.

On the basis of such information relating to the incident furnished with Habibpur Police Station, the aforesaid case was registered for investigation and the investigating agency on conclusion of investigation submitted charge-sheet under Section 376 of IPC. The case was thereafter committed to the court of sessions and records of the case were transmitted for final disposal to the Ld. Additional Sessions Judge, 1st Court, Malda.

The Ld. Trial Court on assessment of the documents and materials collected by the investigating agency was pleased to frame charge against the accused under Section 376 of IPC. The contents of the charge were read over to the accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 12 witnesses which included P.W.1, sister-in-law of the victim who was present at the time of rituals; P.W.2, Sushil Sarkar, neighbour; P.W.3, Victim 'X'; P.W.4, Anil Barman, scribe; P.W. 5, Laxmi Kisku, neighbour and seizure list witness; P.W.6, Dr. Maniklal Das, doctor who examined the victim; P.W.7, Dr. Ashutosh Sarkar, doctor who examined the accused; P.W.8, Banani Roy, lady home guard who took the victim to hospital; P.W.9, husband of victim 'Y'; P.W.10, Sankar Kumar Das, O/C of Habibpur Police Station; P.W.11, Mrityunjoy Biswas, constable who produced the accused at hospital for examination; P.W.12, Bikash Halder, investigating officer of the case.

P.W.1, sister-in-law of the victim, deposed that the incident happened in the house of her elder brother-in-law at about 10.30 A.M. about a year and

month ago. She stated that her elder brother-in-law and his wife had no issue in spite of consulting various doctors. At the relevant date her brother-in-law brought a kabiraj (quack in Ayurvedic medicine) to their house, who took her and her sister-in-law inside a room for performing puja. After sometime the accused sent her out of the room and locked the door of the room when her sister-in-law (victim) remained inside. After some time the accused came out and went away when her sister-in-law/victim represented that the accused Krishnapada raped her against her wish. She identified the accused in Court. In her cross-examination the witness stated that when the Kabiraj/accused was performing puja at that time her mother-in-law, her husband and her elder brother-in-law were present in the house. She further represented that the puja was performed on the floor inside the bed room of her elder brother-in-law's wife/victim.

P.W.2, Sushil Sarkar, is a neighbour who identified the accused in court and deposed that the incident happened about a year and a month ago at the house of the victim. He stated that the victim and her husband are his neighbour who consulted various doctors as they had no child. He deposed that he got information regarding the accused Krishnapada who was renowned and he facilitated the husband of the victim for contracting the accused. Few days after, when he was in the market he heard the accused had been to the house of the couple/neighbour, performed puja and on the next day the victim came to her house and confided that on the previous day after performing puja the accused raped her. In cross-examination the witness deposed that at the

time of the said puja he along with other people of the locality had been to the house of the couple and after puja the Kabiraj/accused asked them to go away. He also answered in cross-examination that he narrated the name of the person from whom he came to know about the accused Krishnapada.

P.W.3 is the victim 'X' who deposed that on 27.05.2014 at about 10.30 A.M. the unfortunate incident happened to her. While narrating the facts she stated that being childless she was advised by her neighbour, P.W.2, to consult the accused Kabiraj, as such she after consulting her husband, invited the accused to her house to perform puja as advised by him. On that day at about 9 A.M. the accused came to their house and represented that to perform the puja one married lady having child is required. So she called her sister-in-law, P.W.1. After sometime, while performing puja she asked her sister-in-law to go out of the room and called her inside the room. The accused was continuously offering flowers at the time of puja and chanted mantras and raped her against her will. The accused thereafter fled away by opening the door. She identified the accused in Court and further represented that because of suddenness of the incident she was mentally upset and could not divulge the incident to the inmates of the house out of shame. Subsequently, on the next day she narrated the incident to her husband and also P.W.1/sister-in-law as also her neighbour Sushil Sarkar and Laxmi Kisku. On 29.05.2014 she went to Habibpur Police Station with her husband and submitted complaint there. The complaint was drafted by Anil Barman as per her direction where she signed. She identified her signature in Court which was marked as Ext.-1. She also identified her

signature on the consent form which was marked as Ext.2 and then she was medically examined wherein she also signed on the medical report which was marked as Ext.-3. Her wearing apparels were also seized under proper seizure list which she signed and the same was marked as Ext.-4. Her wearing apparels were produced before the Court and the different wearing apparels were marked as MAT Ext. I, II & III. In cross-examination the witness on being questioned stated that at the time of commission of the offence by the accused she shouted for once and tried to resist him. There was scuffling and she received pain on her cheeks. On being further questioned she stated that her conch, pola bangles were not broken and her saree was also not torn. She could not attack the accused or she was able to tear-off his wearing apparels.

P.W.4, Anil Barman, is scribe of the FIR/complaint who deposed that on 30.05.2014 he drafted the written complaint as per the instruction and version of P.W.3 which was read over and explained to her and on being satisfied she signed the same in his presence. He also signed on the written complaint as a scribe which was identified by him in Court and marked as Ext.1/1.

P.W.5, Laxmi Kisku, is a neighbour who deposed that she heard of the incident from the victim, P.W.3, on the next day that the accused went to her house on 27.05.2014 for performing puja and after performing puja raped her against her will. Police seized certain wearing apparels of the victim under a seizure list in her presence. She identified her signature in the seizure list

which was marked as Ext. 4/1. She also identified the MAT Ext.-I, II and III, which were wearing apparels of the victim.

P.W.6, Dr. Maniklal Das, deposed that on 02.06.2014 he was posted as Medical Officer at Malda Medical College and Hospital and on that day on being identified by a lady home guard, he conducted medical examination of the victim girl after obtaining her consent. In his opinion victim was habituated to sexual intercourse and for opinion relating to recent sexual intercourse FSL report was required. He identified the report of the victim. Samples were collected and sent for FSL examination. In cross-examination he categorically stated that the victim did not state to him any history of assault and there was no injury on her body other than those on genitals.

P.W. 7, Dr. Ashutosh Sarkar, was demonstrator associated with Malda Medical College & Hospital and on 05.06.2014 on being identified by a Constable of Habibpur Police Station and after obtaining consent of the accused Krishnapada Sutradhar, he conducted medical examination of the accused. On examination he opined that there was nothing to suggest that the accused was incapable of sexual intercourse. Samples were collected and sent to FSL.

P.W.8, is a lady home guard namely, Banani Roy who deposed that on being directed by the Investigating Officer, she took the victim to Malda Medical College and Hospital. She also identified her signature in the consent form and the medical report.

P.W.9, 'Y', is the husband of the victim who deposed that he was married with the victim for six years and they did not have any child. A neighbour namely Sushil Sarkar informed them that the accused being a 'Kabiraj' could help them over this issue. So the accused was called and on 27.05.2014 at about 9.00 A.M. he came to their house for performing puja. Minu Tudu, wife of his brother by village courtesy, was called and the accused took her inside the room for performing puja. After some time Minu Tudu was sent out and his wife/victim was called inside the room, while his wife was inside the room at about 10.30 A.M. he had to go out for his work and so he requested Minu Tudu and Munni Soren to be present at their house. At about 5.00 P.M. he returned from his work and on his query regarding the puja he found his wife to be upset and silent. After two days his wife divulged to him that on the relevant date inside the room accused forcefully raped her against her will. As such they went and complained to Habibpur Police Station. Investigation commenced and the wearing apparels of his wife were seized. He identified his signature in his seizure list and also the wearing apparels which were shown to him which was admitted in evidence. He also identified the accused in Court. In cross-examination he stated that because of shame for two days his wife could not disclose the incident to him, however she divulged the incident to Minu Soren earlier.

P.W.10, is Sankar Kr. Das who was Officer-in-Charge of English Bazar Police Station on the relevant date when after receiving the complaint from the

victim he filled up the formal FIR, registered the case and endorsed the same to Sub-Inspector, Bikash Halder for investigation.

P.W.11, is Mrityunjoy Biswas, Constable of Police who identified the accused Krishnapada Sutradhar at Malda Medical College and Hospital. He identified his signature in the consent form as also the Medical report, which was already marked as exhibits.

P.W. 12, Bikash Halder is the Investigating Officer of the case, who deposed the chronology and manner in which he carried out investigation after the case was endorsed to him by the Officer-in-Charge. The witness deposed that he interrogated the victim and after that she was sent for medical examination. Thereafter he verified the P.O. and prepared rough sketch map with index and also seized the wearing apparels of the victim by preparing a seizure list. Statement of witnesses was recorded by him under Section 161 of Cr.P.C. The accused was also arrested by him and produced before the learned CJM, Malda. He identified the accused in Court and deposed that the accused was also sent for medical examination and on conclusion of investigation he submitted charge-sheet under Section 376 of IPC. In cross-examination he stated that he did not sent the wearing apparels of victim and also vials containing urethral swab of the victim and smear of the accused to FSL for chemical examination.

Learned Advocate appearing on behalf of the appellant submitted that the prosecution has failed to prove its case not only on a cumulative

appreciation of whole of the evidence but also on the settled principle of the sole testimony of the prosecutrix which do not inspire any confidence to convict the appellant.

To that effect learned advocate drew the attention of the version of the prosecutrix i.e. P.W.3 wherein she in her cross-examination deposed that she shouted for once and tried to resist the accused. This version even if accepted do not match with the version of P.W.1 who was just outside the room and did not hear any hue and cry. Learned advocate also drew the attention to the evidence of P.W.9, the husband of the victim who in his examination-in-chief before the Court deposed that as he had to leave at about 10.30 A.M. for work he requested Minu Tudu and Munni Soren to be presented in their house. By referring to such version learned advocate emphasised that two of the ladies were standing just outside the place of occurrence which happen to be the room/bedroom of the victim and her husband and even then there was no complaint for the next two days. None of the ladies could hear any sound of screaming or any hue and cry. This version itself raises doubt regarding the version of the prosecutrix. It has also been submitted that although in the present case the prosecution relied upon P.W.1, Minu Tudu but the other witness Munni Soren was not relied upon by the prosecution. Additionally, it was pointed out that another contention of the victim raises doubt that his conch, pola and bangles being not broken. Further, though the wearing apparels of the victim were seized but the same were not sent for Forensic examination.

Learned Advocate pointed out that even the Doctor, P.W.6 in his cross-examination stated that the victim did not state to him regarding any history of sexual assault. Learned advocate thereafter relied upon the judgment of the Hon'ble Supreme Court being ***Chotkau -versus- State of Uttar Pradesh reported in (2023) 6 SCC 742*** and submitted that in a similar set of circumstances the Hon'ble Supreme Court acquitted the appellant on the factual matrix of the case and to that the effect referred to paragraph 13 of the said judgment which is quoted below:

“13. We have carefully considered the rival contentions. In our view, the questions that crop up for our consideration revolve around:

13.1. *(i) The trustworthiness of the testimonies of PWs 1 to 3, in the light of certain contradictions.*

13.2. *(ii) The consequences of the delay on the part of the police in forwarding the FIR to the court.*

13.3. *(iii) The failure of the prosecution to produce forensic/medical evidence and its effect.*

13.4. *(iv) The manner in which the questioning under Section 313 of the Code was undertaken and its effect upon the findings recorded”*

Attention of the Court was drawn to the list of material exhibit being MAT Ext.I the saree; MAT Ext.II blouse; MAT Ext.III petticoat; MAT Ext. IV urethral swab; MAT Ext.V smear and it was submitted that although these were sent to forensic laboratory but no report was submitted before the Court to substantiate the contention which would lead to any corroborating evidence. It was lastly submitted on behalf of the appellant that having regard to the series

of contradiction appearing in evidence in the present case, it would be dangerous to arrive at a conclusion of guilt and direct the appellant to serve out any sentence of imprisonment.

Mr. Dutta, learned advocate appearing on behalf of the prosecution submitted that the prosecution in this case has taken into account the version of the victim, the witnesses who were present on the relevant date of the offence, the evidence of the husband (P.W. 9) who was also present for a substantial period of time when the appellant was performing his ritual. Further the delay which has occurred in this case has been properly explained by the victim in the letter of complaint.

According to the State the reason so assigned for delay is not very uncommon in the Indian Society as the victim lady has categorically stated that it was out of fear and shame she could not divulge the incident but after failing to bear ignominy of rape she disclosed the incident to her husband when they decided to file the complaint. The reason according to the prosecution is justified, acceptable and is usual having regard to the threat and suddenness of the incident suffered by the victim. Learned advocate for the State also reminded the Court regarding the principles which are to be followed in cases under Section 376 of the Indian Penal Code and submitted that sole testimony of the prosecutrix is enough for arriving at a conclusion of guilt. To that effect Learned advocate for the State relied upon the judgment of ***State of Himachal Pradesh -versus- Gian Chand reported in (2001) 6 SCC 71.*** Emphasis was made on the factum relating to delay and reference was made in

the observation of the Hon'ble Supreme Court where in thereferred judgment Hon'ble Supreme Court categorically held that the delay in lodging FIR cannot be used as ritualistic formula for doubting the prosecution and discarding the evidence, solely on the ground of delay in lodging the FIR.

Learned advocate thereafter referred to paragraph 17 of the said judgment in ***State of Punjab -versus- Gurmit Singh reported in (1996) 2 SCC 384*** which is quoted below:

“17.....A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

The approach adopted by the High Court runs into the teeth of law so stated and hence stands vitiated”

Lastly it was submitted by the learned advocate for the prosecution/State that the parameters required to prove the case under Section 376 of the Indian Penal Code has been adhered to in the instant case and where the sole testimony of prosecutrix assumes importance in such cases there is no reason to disbelieve the victim and arrive at a different finding from that which has been arrived at by the learned Trial Court. As such according to

the State no interference is called for in the judgment and order of conviction and sentence so passed.

I have considered the version of the learned advocate appearing for the appellant as well as the learned advocate appearing for the State and also taken into account the version of all the prosecution witnesses as well as the materials produced before the Court. Before proceeding further and accepting the principle which has been reiterated by the Hon'ble Supreme Court in majority of the judgments that for convicting an accused in a case under Section 376 of the Indian Penal Code, the sole testimony of the prosecutrix can be relied upon, it would be worthwhile to refer to State of **Rajasthan -versus- Babu Meena reported in (2013) 4 SCC 206** where it has been held in paragraph 8 and 9 as follows:

“8. Mr Jain assails the acquittal of the respondent under Section 376 of the Penal Code and contends that the trial court ought to have accepted the evidence of Kirti (PW 3). He submits that conviction can be based on the sole testimony of the prosecutrix and the trial court erred in rejecting her evidence and acquitting the respondent. In support of the submission he has placed reliance on the judgment of this Court in Vijay v. State of M.P. [(2010) 8 SCC 191: (2010) 3 SCC (Cri) 639] Relevant para of the judgment reads as under: (SCC p. 198, para 14)

“14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.”

9. *We do not have the slightest hesitation in accepting the broad submission of Mr Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused”.*

Further, in ***Dinesh Jaiswal -versus- State of Madhya Pradesh reported in (2010) 3 SCC 232*** in paragraph 10 the Hon’ble Supreme Court was pleased to hold as follows:

“10. *Mr C.D. Singh has however placed reliance on Moti Lal case [(2008) 11 SCC 20: (2008) 3 SCC (Cri) 950] to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one”.*

On a reading of the aforesaid two judgments of the Hon’ble Supreme Court it can be concluded that there is no impediment in relying upon the sole

testimony of a witness and more so in cases of sexual assault where offences are committed in seclusion but such statement must be worthy of credence and reliable so that the evidence of the single witness prima facie inspires confidence.

In the present case apart from the deficiency of the Investigating Agency in not producing the FSL report or not obtaining the FSL report even after sending wearing apparel of the victim to the concerned department what is much more glaring is the version of the victim herself wherein she in her deposition before the Court in cross-examination stated that she shouted once and tried to resist the accused. It would not be out of place to state that the other witnesses were just standing outside the room and there was no complaint from them that they could hear any sound of screaming or any hue and cry. In fact to this extend there is a difference in version of the victim i.e. P.W.3 and P.W.1 sister-in-law of the victim. Adding to that the husband's deposition before the Court that when he went away for his job at 10.30 A.M. he requested two ladies including P.W. 1 to remain at the spot. As such having regard to the overall circumstances and the manner in which the victim narrated the incident do not inspire confidence of this Court for relying upon the sole testimony as a basis for convicting the appellant.

As such the judgment and order of conviction and sentence so passed by the learned Additional Sessions Judge 1st Court, Malda calls for interference.

Thus, the judgment and order of conviction dated 22.02.2021 & 23.02.2021 passed by the Learned Additional Sessions Judge, 1st Court, Malda in Sessions Trial No. 07/2015 arising out of Sessions Case No. 301/2014, which originated from Habibpur Police Station Case No. 106/14 dated 31.05.2014 is hereby set aside.

Appellant is acquitted of the charges.

Accordingly, Criminal Appeal No. 103 of 2021 is allowed.

If the appellant is on bail he is discharged from the bail bonds.

Pending connected applications, if any, are consequently disposed of.

Department is directed to send back the LCR immediately. A copy of the judgment be forwarded to the Id. Trial court immediately for compliance regarding the directions given above.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)