

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 113 of 2013

Joynal Abedin

-Vs-

The State of West Bengal

For the Appellant : Mr. Jayanta Narayan Chatterjee
Ms. Sreeparna Ghosh
Mr. Bhaskar Mondal

For the State : Mr. Avisekh Sinha
Mr. Ranadeb Sengupta

Heard on : 15.12.2023, 20.02.2024, 07.03.2024, 14.06.2024

Judgment on : 14.08.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 18.01.2013 and 19.01.2013 passed in S.C. No. 262 of 2011 (S.T. No. 182 of 2011) by the Learned Sessions Judge, Dakshin Dinajpur at Balurghat thereby convicting the appellant for the commission of an offence under Section 376(2)(f)/511 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 4 years and to pay a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for two months.

2. The prosecution case precisely stated as follows:-

“On 27th July, 2011 at about 07:00 p.m. Sajia Bibi sent her daughter the victim girl and son Ajahar Ali to the house of Joynal Abedin of the same Village- Ranipur for bringing some medicine for her husband who was sick but accused took an opportunity of hearing victim on the ground and opened her pants which as following by jostling. Accused also placed his hand on the breast of the victim girl but his brother Jahar Ali cried and rushed to the P.O. and saw the victim daughter in such position. She narrated the occurrence to others who assembled there and later she lodged written complaint before the Banshihari P.S.”

3. On the basis of the aforesaid written complaint lodged by one Sajida Bibi (PW-1), Banshihari P.S. Case No. 99/11 dated 28.07.2011 under Sections 376/511 of the Indian Penal Code was registered for investigation.

4. Upon conclusion of the investigation, charge-sheet under Sections 376(2)(f)/511 of the Indian Penal Code was submitted against the appellant by the investigating agency.

5. The Learned Trial Court framed charges against the appellant under Sections 376(2)(f)/511 of the Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.

6. In the course of trial the prosecution examined as many as 12 witnesses and exhibited certain documents.

7. The Learned Advocate for the appellant submitted that:-

- i. The Learned Trial Judge failed to appreciate the absence of documents to establish the age of the girl to be below 12 years to attract the provision of Sections 376(2)(f)/511 of I.P.C.
- ii. The Learned Trial Judge failed to appreciate without specific age proof could not be attracted at all.
- iii. There was contradiction in the complaint, statement of the victim girl recorded under Section 164, Cr.P.C. and the statement given to the doctor by the mother of the victim girl during medical examination.
- iv. There was a dispute between the appellant and the mother of the victim girl regarding a property which led to false implication of the appellant.
- v. There was no indication at all regarding attempt to commit rape to constitute a case of outrage of modesty under Section 354 of the Indian Penal Code.
- vi. In the statement recorded under Section 164 of the Cr.P.C. the victim girl told that the accused opened the panty whereas she stated before the doctor that the accused tried to open her panty but failed. Such gross inconsistencies and contradictions along with intent of false implications the appellant must be acquitted.

8. The Learned Advocate for the State submitted that the relevant facts of the brother's presence at the spot forms res gestae under Section 6 of the Indian Evidence Act and the scratch marks on the left side on the back of the victim which was superficial in nature as mentioned in Exhibit-2, i.e. medical report, corroborated the attempt on the part of the appellant to have

committed the offence and the prosecution was been able to prove its case and the appeal shall be dismissed.

9. A circumspection of evidence of the prosecution witnesses revealed as follows:

- i. PW-1 deposed her daughter a 11 years old child being a student of Class V along with her minor son had gone to bring medicine for her husband. Her minor son informed her of the molestation to her daughter by the appellant. PW-1 went to the P.O. and saw her daughter lying and Jaynal Abedin instantly fled. She took her daughter to the house of Jaynal Abedin. She complained his father and told about the act of misbehavior by the appellant. Many persons assembled who were informed the persons of the mishap. Thereafter, she went to P.S. and lodged complaint written by one Bablu. Her signature upon the written complaint was marked Exbt.-1. (Written complaint was marked Exbt. 1/i; on admission). After one day she took her daughter to Kaldighi Hospital for medical examination. She signed upon the medical report which was marked Exbt.-2. She narrated the facts to doctor.
- ii. During cross-examination PW-1 stated uncle-in-law's house of the appellant was adjacent to her house. She sold the land to the appellant person who had constructed house upon that. She did not deliver possession of that land. She could not state whether 4 decimal lands was sold. Rakibuddin was the father of accused. She did not know whether Rakibuddin had complained against her and her husband for not delivering the possession of the land sold.

- iii. PW-2, the victim in her deposition narrated the manner in which the appellant molested her. After her mother arrived Jaynal fled away. Her mother took her to Gangarampur Hospital for medical examination. She was also taken to Buniadpur Court and her statement was recorded by the learned Magistrate.
- iv. PW-3 in his deposition stated that the victim was his sister. He and his 'Didi' went to bring medicine for his father. When both of them were returning Jaynal caught his 'Didi' from behind and threw her on the ground and opened her clothes. He went and called his mother. Seeing his mother Jaynal fled.
- v. During cross-examination PW-3 stated that he was interrogated by I.O. He did not stated to I.O. that he had called his mother.
- vi. PW-4 stated that PW-1 was his mother and PW-2 was his sister. He did not see the incident. Police seized the clothes of the victim. Signature of the witness on the seizure list was marked Exbt.-4.
- vii. The evidence of PW-5, PW-6 and PW-7 was based on hearsay. PW-7 was the seizure list witness regarding the sized clothes.
- viii. PW-10 in his deposition stated on 28.07.2011 at 2:45 p.m. he examined the victim, the daughter of Abdul Khalek, Muslim Female, aged 11 years of village Ranipur under Banshihari P.S. in reference to Banshihari P.S. Case No. 99/11 dated 28.7.2011 u/S 376/511 of IPC. According to patient's mother, victim and her brother went to Jainal Abedin's house for bringing some medicines. At the house of Jainal Abedin the victim was forcefully hugged by Jainal Abedin and she was put on floor. She

was caressed carefully by Jainal Abedin. Her brother was present at the site and he tried to resist Jainal Abedin. Jainal Abedin tried to open her panty, but failed. Intercourse was not done. On examination he found two scratch marks measuring $\frac{1}{4}$ " around left side of the back. No visible injury or scratch or any other mark over vulva, vagina, perineum, inner thigh, abdomen, breast or other private parts. No discharge or foreign body or abnormal discharge from vagina. Hymen was intact. Two vaginal swabs were taken from posterior fornix, sealed and labeled and handed over to H.G. The report prepared and signed by him which was marked as Exbt.-2/2.

- ix. During cross-examination PW-10 stated that the patient was brought and identified by her mother.
- x. PW-11 in his deposition stated that he was A.S.I of Police then posted at Banshihari P.S. On the basis of the written complaint Banshihari P.C. Case No. 99/1 was initiated. He took up the investigation being endorsed by I.C. Amit Paul. In course of investigation, he visited P.O. prepared rough sketch map with index of the P.O. in two pages. The sketch map with index (Rough sketch map with index was marked Exbt.8). He examined witnesses and recorded their statement u/S 161 Cr.P.C. He seized one 'panty' and frock of the victim under a seizure list. The said seizure list was marked Exbt.-4/2. He prepared label of the seized articles. He sent the victim for her medical examination. He collected medical examination report. He arrested the accused person and forwarded him to Ld. Court. He also made prayer for recording

statement of the victim u/S 164, Cr.P.C. The same was recorded by Ld. Magistrate. He also made prayer for potency test of accused person which was conducted by doctor. He collected potency test report. On completion of investigation he submitted charge sheet against accused person.

- xi. During cross-examination PW-11 stated that accused used to sell medicine. He had not seized any medicine to establish that he sold medicine.

10. In **State of M.P. v. Mahendra**¹, the Hon'ble Supreme Court held as follows::

“Analysis

Distinction between “preparation” and “attempt” to commit rape

12. *It is a settled proposition of criminal jurisprudence that in every crime, there is first, mens rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, “attempt” is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. “Attempt” is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.*

13. *There is a visible distinction between “preparation” and “attempt” to commit an offence and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of “preparation” consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission of the offence. Whereas, an “attempt” to commit the offence, starts immediately after the completion of preparation. “Attempt” is the execution of mens rea after preparation.*

¹ (2022) 12 SCC 442

“Attempt” starts where “preparation” comes to an end, though it falls short of actual commission of the crime.

14. *However, if the attributes are unambiguously beyond the stage of preparation, then the misdemeanours shall qualify to be termed as an “attempt” to commit the principal offence and such “attempt” in itself is a punishable offence in view of Section 511IPC. The “preparation” or “attempt” to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused; and as to whether or not the incident tantamounts to transgressing the thin space between “preparation” and “attempt”. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong inference of the likelihood of commission of the actual offence, the accused will be guilty of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws.*

[.....]

21. *We may at the outset explain that what constitutes an “attempt” is a mixed question of law and facts. “Attempt” is the direct movement towards the commission after the preparations are over. It is essential to prove that the attempt was with an intent to commit the offence. An attempt is possible even when the accused is unsuccessful in committing the principal offence. Similarly, if the attempt to commit a crime is accomplished, then the crime stands committed for all intents and purposes.*

[.....]”

11. PW-1 in her cross-examination stated that the house of the appellant was adjacent to her house. She had sold the land to the appellant who constructed his house thereon but she did not deliver possession of that land to the appellant. She denied of a complaint filed against her and her husband for refusal to deliver possession of land in favour of the appellant

and had subsequently threatened the appellant. The house of the appellant consisted of many persons. The enmity between the parties is conspicuous from the evidence adduced by the prosecution witnesses.

12. PW-2 in her statement recorded under Section 164 of the Code of Criminal Procedure stated that she had been to the house of the appellant along with PW-3 her brother to seek medicines for her father. On her way to exit therefrom the appellant embraced her and closed the door and removed her undergarments. At the relevant point, PW-2 along with appellant and her brother PW-3 were present in the room. Contrary to what she had stated in her evidence before the Court that the appellant had caught her and threw her on the ground. It is improbable that the house of the appellant having been occupied by other residents.
13. The incident of the aforesaid sexual molestation was unnoticed by any other person in the house. The Investigating Officer did not examine any of the inmates of the house of the appellant. The evidence of PW-5 and PW-6 is based on hearsay. No independent witness with regard to the assemblage of people in front of the house of the appellant or the complainant was cited to corroborate the incident. The Investigating Agency did not endeavour to prove the age of the victim to be a minor.
14. PW-3 a minor appeared to be tutored to depose with contradictions. If PW-3 had raised an alarm or cried aloud, the inmates of the house of the appellant should have been aware of the incident. The appellant would not have attempted to have ravished the victim in the presence of PW-3 and waited at

the spot for a considerable period of time as PW-3 the brother of the victim had left the room to inform either his mother or somebody else.

15. PW-10 in his evidence stated as follows:-

"I am a member of West Bengal Health Services, now posted at Gangarampur Sub-Divisional Hospital as Medical Officer. On 28.07.2011, I was posted at the same hospital in the same capacity. On that day at 2.45 p.m. I have examined Anjuwara Beauty, daughter of Abdul Khalek, Muslim Female, aged 11 years of village Ranipur under Banshihari P.S. in reference to Banshihari P.S. Case No. 99/11 dated 28.7.2011 u/S 376/511 of IPC. According to patient's mother victim and her brother went to Jainal Abedin's house for bringing some medicines. At the house of Jainal Abedin the victim was forcefully hugged by Jainal Abedin and she was put on floor. She was caressed carefully by Jainal Abedin. Her brother was present at the site and he tried to resist Jainal Abedin. Jainal Abedin tried to open her pants, but failed. Intercourse was not done. On examination I found: (1) two scratch marks measuring ¼" around left side of the back. (2) No visible injury or scratch or any other mark over vulva, vagina, perineal, inner thigh, abdomen, breast or other private parts. (3) No discharge or foreign body or abnormal discharge from vagina. (4) Hymen was intact. (5) Two vaginal swab were taken from posterior fornix, sealed labeled and handed over to H.G. This is the report prepared and signed by me. (Report is marked Exbt.2/2).

During cross-examination PW-10 stated that the patient was brought and identified by her mother."

16. The entire course of events improbabilised the act of an attempt to commit rape upon the victim emboldened by the fact of the opinion of PW-10.
17. In view of the above discussions, the instant criminal appeal being CRA 113 of 2013 is allowed.
18. Accordingly, the instant criminal appeal being CRA 113 of 2013 is disposed of.
19. There is no order as to costs.
20. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
21. 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.)