

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 209 of 2010

Sri Shyamal Barman

-Vs-

The State of West Bengal

For the Appellant	: Mr. Tushar Kanti Mukherjee Mr. Tulshi Das Ray Mr. Himangshu Ghosh
For the State	: Mr. Avishek Sinha
Heard on	: 14.12.2023, 19.01.2024, 19.02.2024, 01.05.2024
Judgment on	: 02.07.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 29.01.2010 and 30.01.2010 passed by the Learned Additional Sessions Judge, 3rd Fast Track Court, Cooch Behar arising out of Sessions Case No. 169 of 2009 under Sections 448/376/511 of the Indian Penal Code and sentenced the appellant to suffer rigorous imprisonment for 1 year and to pay fine of Rs.1000/- in default of payment of fine, further imprisonment for 3 months for the offence punishable under Section 448 of the Indian Penal Code and further sentenced the appellant to suffer rigorous imprisonment for 5 years and to pay fine of Rs.2000/- in default of payment of fine, he shall undergo rigorous imprisonment for 4 months for the offence punishable under

Sections 376/511 of the Indian Penal Code and both the sentences shall run concurrently. The appellant was further directed to pay compensation of Rs.25,000/- only to the de-facto complainant within three months in Sessions Case No. 169 of 2009 arising out of Kotwali Police Station, Case No. 171 dated 16.03.2009 under Sections 448/376/511 of the Indian Penal Code.

2. The prosecution case precisely stated that on 16/03/2009, the victim lodged a complaint to the Inspector-in-Charge, Kotwali Police Station alleging that on 14/03/2009 at about 9 p.m. to 10 p.m., she was along with her three children were at home in the absence of her husband. In the light of lamp, she recognized that appellant who forcibly entered into the room, he pressed the mouth of the victim with sari, undressed her, tore her blouse, and tried to commit rape upon her but due to her cries along with that of her children, the appellant escaped.

It was mentioned that a marriage ceremony was solemnized at that time at the next door room.

3. On the basis of the aforesaid complaint, the Police initiated Kotwali Police Station, case No. 171 dated 16.03.2009 under Sections 448/376/311 of the Indian Penal Code.
4. During investigation, on 20.03.2009, the de-facto Complainant made a statement under section 164 of the code of Criminal Procedure before the Learned Judicial Magistrate stating that the appellant committed rape upon her forcibly.
5. After completion of investigation, the Police submitted charge- sheet against the appellant under sections 448/376 of the Indian penal Code.

6. The charge was framed under sections 448/376 of the Indian Penal Code against the appellant.
7. The prosecution examined as many as 12 witnesses and exhibited 6 documents to prove the charge.
8. Learned Advocate for the appellant submitted that –
 - i. The prosecution failed to prove the case beyond all reasonable doubts.
 - ii. The alleged victim girl, PW-1, did not lodge any complaint with the Officer-In-Charge, Katwali Police Station on 15.03.2009. Ext-I, the written complaint was received by the Police on 16.03.2009. No explanation was given for such inordinate delay in lodging the complaint and as such, no reliance should be given upon the written complaint. According to the prosecution, no complaint was received by the Police on 15.03.2009.
 - iii. The prosecution failed to prove the charge brought against the appellant under section 448 of the Indian Penal Code; No prosecution witnesses supported the case of the de-facto complainant, PW-1. No PWs had seen the appellant to enter into the residence of the PW-1. Though the Children of the PW-1, were the eye witnesses of the alleged occurrence but they were not examined to prove the case and the contradictory statements of PW-1 could not be relied on.
 - iv. When the victim house wife, PW-1 stated on oath that she was raped by the appellant and even she made statement before the Judicial Magistrate that she was raped by the appellant but the prosecution failed to prove the charge under section 376 of the Indian Penal Code.

The Judge should not hold that the appellant was guilty of the offence punishable under sections 376/511 of the Indian Penal Code and the Learned Judge should hold that the entire case was concocted story and the Learned Judge should acquit the appellant from the charges under sections 448/376 of the Indian Penal Code.

- v. No witnesses had supported the prosecution case that the appellant committed an offence under sections 376/511 of the Indian Penal Code and no charge was framed against the appellant under sections 376/511 of the Indian Penal Code but the Learned Judge wrongly hold that he appellant was the guilty of the offence punishable under section 376/511 of the Indian Penal Code.
 - vi. The prosecution failed to prove the case beyond all reasonable doubts and as such, the Judgement and order of conviction and sentence should be set aside and the appellant is entitled to be acquitted.
9. Learned Advocate for the State in utmost fairness stated that the prosecution failed to establish the case beyond reasonable doubt and the investigation was perfunctory and left it to the discretion of the Court.
10. A circumspection of the prosecution witnesses revealed as follows:
- i. PW-1 in her deposition stated her family consisted of her husband, Jiten Barman and her four children and were cultivators. She had four tin shaded rooms in her house (Chhapra) constructed under “Indira Aash Plan”. The occurrence took place on a Saturday which was 30th day of Phalguna (Bengali year’s month) corresponding to English calendar i.e. on 14.03.09 at 9/10 P.M.

On that day one marriage ceremony was held at her adjacent house. She attended that marriage ceremony at about 7:30 P.M and returned at about 8:30 p.m. Her husband had gone to local market called Chandamari bazar. After returning from the marriage ceremony she fed her children and she slept with them. At that time only she heard a sound on the door and she went out of her room with a lamp but did not find anyone present out of the door. She came back to her room and slept. Having heard a knocking sound on the door, she again opened the door with a lamp in her hand Shyamol Barman instantly caught hold of her and dragged her on the bed. Immediately she raised cries but the appellant grasped her mouth with her saree. Her children cried. At that time, the appellant showed her one knife and in that condition he raped him. Her children continued raising cries. During scuffling between him and the accused, her children woke up and continued to cry and after ravishing her the accused fled.

After some time her husband returned from the local market and the victim narrated the occurrence to her husband.

On the next morning she accompanied her husband to the P.S. One Naren Mohorar wrote the complaint as per her instruction. The complaint was marked Ext.1 and signature of the witness Sumitra Barman thereon was marked as Ext.1/1.

After filing of the complaint, police went to her house and she narrated the incident to the police. She was thereafter taken to the hospital where she was medically examined and she also put her

signature on the report. The medical report was marked 'X' for reference and signature of that witness thereon was marked as Ext.-x/1. She further narrated the incident to the Judicial Magistrate who wrote it. The statement was marked "y" for reference and signature of the witness thereon was marked Ext.-Y/1 series.

- ii. In her cross-examination PW-1 stated that she became acquainted with Naren on the day on which she instructed him to write the complaint. On that day she went to his house to write the complaint. She went to the house of Naren because the husband of her Nanad happens to be the relative of Naren and for that reason only she went to the house of Naren at about 8:30 a.m. The written complaint was written at the residence of Naren. From the house of Naren she came to the P.S. and at that time it was about 10/10:30 a.m. When she gave her written complaint to the police at the P.S she was accompanied with her husband and Kakaru. During writing of her complaint she did not mention that accused forcibly committed rape on her due to fear. She did not instruct the writer to mention in the complaint that she had not become able to mention all due to fear. During the time of filing of the complaint she stated to the police that she had forgotten to mention in the F.I.R that accused had committed rape on him and at that time police stated to him that as F.I.R was already written that could not be altered further. She further stated during the time of writing the written complaint she asked Naren to mention that accused committed rape on him. She knew how to read.

It was further deposed that in between her house and the house of accused there were three houses. Those houses were of Bablu Barman, Bipul Barman who were the persons of the accused and the another house belonged to Nalit who was her 'Bhasur'. Police did not seize that lamp that was in her hand when she opened the door at first. Accused committed rape on her on her bed (Chowki). Accused continued raping him for about 10 minutes. She could not remember if accused discharged his semen during the time of committing rape on her and she could not say if the semen stained her petticoat or not. At that time her wearing apparels contained saree, blouse and petticoat. During the time blouse, of scuffling her saree/and petticoat were torn. She wanted to give those torn wearing apparels to police but police did not seize them and she stated the same to the Ld. Magistrate. The scuffling continued for about 10 minutes but she did not sustain any injury on her person. She also did not sustain any injury on her private parts or her breasts. Accused did not bite him on her chest. She sustained minor injuries on her upper portion of breasts but doctor did not see that though she stated that to the doctor. She did not show her petticoat to the doctor.

On hearing her cries nobody appeared because all had gone to attend the marriage ceremony. The marriage ceremony took place at a house located far away from her house and in between her house and the said house there was a vacant land. After hearing her cries the people who came were the relatives of accused namely Jagadish

Barman (nephew of the accused) but Bipin, Mahesh, Bablu, Maloti, Manjuri, Ajit did not come on that night.

She did not see if accused also discharged semen during raping her on the bed or not. She did not show the bed on which accused committed rape on her. During that night her parents-in-law did not come but they had come on the next day. She did not inform the incident to their local Panchayat. She wanted to give the said saree to police but police did not take it.

She could not say if any case was pending against her husband.

She could not say if there was any dispute between her husband and accused over the matter of Gram-panchayat and assault took place with the accused and her husband and thereafter accused filed the case against her husband or not.

It was a fact that one case was pending against her husband.

Perhaps her husband returned from local market after 15/20 minutes from the occurrence. After hearing the occurrence from him her husband did not call any person. Her husband also did not call any person including local people or local Panchayat Pradhan.

On the following day in the morning she narrated the incident to Bipin Barman who was a chief man of their locality.

- iii. PW-2 in his deposition stated that he was a cultivator. Sumitra Barman who was the de-facto complainant of that case was his wife. During the time of occurrence out of his four children, three were with his wife and another had gone out of his residence for work and at the time of occurrence out of remaining three children, one had

gone to attend the marriage ceremony that was taken place in the locality and that two children were with his wife during occurrence. Those two children who were with his wife were aged about 9 years and 5 years respectively. During occurrence he had gone away to the local market called Chandamari bazar. During occurrence his wife and those two children were present. The occurrence took place on 30th Phalguna (Bengali year's month) at about 10 p.m. He returned back from the market at about 11 p.m. and found his wife was crying and learnt from the incident.

- iv. PW-3 in his deposition inter alia stated that he heard that Sumitra filed a case against Shyamol and he had come to depose in connection with that case, Police did not ask him anything and was declared hostile.
- v. PW-1-The victim stated that rape was committed upon her in presence of two children, who were not examined. The police did not seize the clothing for forensic examination, the lamp was not seized, no marks of assault were seen, the victim's husband was not present at the time of occurrence. Though the victim was raped on 14.03.2009 and complaint was lodged at 16.03.2009.
- vi. In the complaint, the victim stated that the appellant attempted to commit rape upon the victim, the victim did not lodge any complaint to the local Police Fari.
- vii. PW-2 the husband was not present at home at the time of occurrence, his evidence was based on hearsay and could not be relied upon.
- viii. PW-3, PW-4, PW-6, PW-7 and PW-9 were declared hostile.

- ix. PW-5 the sister-in-law of the victim was an interested witness.
- x. PW-8, the Doctor, examined the potency test of the appellant.
- xi. PW-10 the Lady Constable, accompanied with the victim at the hospital.
- xii. PW-11, the Doctor, who examined the victim, stated that he found no direct evidence of sexual assault, no evidence of injury on her private parts and body, no evidence of foreign particles on her private parts, her vagina was spacious, vaginal swab was taken and sent for chemical examination but no report of swab test was produced at the time of adducing evidence.
- xiii. PW-12, the Investigating Officer, stated that he submitted charge sheet under section 448/376 of the Indian Penal Code, he did not seize any kerosene lamp from the place of occurrence, he did not seize saree, petticoat, blouse of the victim body, the victim did not state to the PW-12 that the scribe of the complaint was also not informed that the victim was raped by the appellant, no report of swab test was produced. PW-12 did not send anything for FSL Examination. FIR recording officer was not examined.
- xiv. The victim in the written complaint stated that the appellant tried to commit rape upon the victim, whereas the victim stated that the appellant committed rape upon her at the time of adducing evidence.
- xv. There was no other witness to prove the charge under sections 448/376 of the Indian Penal Code. The children of the victim who were aged about 9 years, 6 years and 3 years but the children were not cited as witness.

- xvi. The different statements of the victim were disbelieved by the Learned Trial Judge. The contradictory statements of the victim cast a serious doubt on the case of the prosecution. The appellant relied upon the reported judgment (2019) 1C Cr. LR (CAL) 63 wherein the Hon'ble Division Bench of the Hon'ble High Court casted doubt about the prosecution case and set aside the order of conviction and sentence passed by the Trial Court. In the said case, the prosecution mostly stood on the similar facts and circumstances of the case.
- xvii. The evidence of PW-5 was based on hearsay.
- xviii. PW-8 in his deposition stated that he was a Medical Officer now posted at M.J.N. Hospital, Cooch Behar. On 15.05.09 he was posted at the same place with same Capacity. On that day in connection with Kotwali P.S Case No. 171/09, dt.16.03.09, u/s 448/376/511 I.P.C one Shyamol Barman was produced before him for his potency test. He was produced and identified by S.I of police Sri Bodhaditya Roy. After his consent he examined him and found that he was potent and capable in doing sexual intercourse. That was the said report prepared and signed by him. Now the medical report was marked as Ext.2 as a whole and signature of that witness on the report was marked as Ext.2/1.
- xix. PW-11 in his deposition stated that he was a Medical Officer now posted at M.J.N Hospital, Cooch- Behar. On 17.03.09 he was posted at the same place with same capacity. On that date he examined Sumitra Barman, 20 years, Female, of village Putimari, Fuleswary, under P.5 Kotwali, in connection with Kotwali P.S case No.171/09,

dt.16.03.09, u/s 448/376/511 I.P.C on being produced and identified by L.C 927 Maloti Roy. During examination Staff-Nurse R. Das was present. He also took consent of this patient before her examination and that patient also signed the medical report. That was the signature of the patient Sumitra Barman and that was the signature of Staff-Nurse R. Das.

During examination he found no direct evidence of sexual assault, no evidence of injury on her private parts and body, no evidence of foreign particles on her private parts, her vagina was specious, vaginal swab was taken and sent for chemical examination. That was the medical report prepared and signed by him. That was his signature. The medical report was previously made 'X' for reference. Now the medical report was marked as Ext.-3 and signature of Dr. D. Dutta thereon was marked as Ext.-3/3 and signature of Maloti Roy L/C previously made Ext.-X/2 be marked as Ext.-3/2 and signature of Sumitra Barman previously made Ext.-X/1 be marked as Ext.3/1.

- xx. In cross-examination of PW-11 stated that Patient did not give any history about any incident to him. He could not definitely say that in case of forcible rape and pressing of breasts during rape there always be some injury. He did not find any injury and he did not find any injury of sexual assault. He did not find any mark of sexual assault.
- xxi. PW-12 in his deposition stated that he was S.I of police now posted as Additional S.F reader in Alipurduar. On 16.03.09 he was posted at Kotwali F.S Cooch Behar an S.I. On that date S.I Parimal Paul was the O/C of that P.S. and on that date one Sumitra Barman, who

Jiten barman of village Putimari, Fuleswary under P.S. Kotwali filed a written complaint and it was received by O/C P. Paul. He know his handwriting and signature as he worked with him. After receiving the complaint he started Korwali P.S case No.179/09, dt.16.03.09, u/s 448/376/511 I.P.C against accused Shyamol Barman by making an endorsement on the written complaint. The written complaint in already marked as Ext.-1, now the endorsement be marked an Ext.1/2. He also filled in formal F.I.R. That was the formal F.I.R written and signed by him. Now it was marked an Ext.-4 and signature of S.I P Paul thereon be marked as ext.-4/1. After that he gave the case to him for investigation.

During investigation he visited the P.O., prepared rough sketch map of the P.O with index. That was the rough sketch map of the P.O with index marked as Ext. 5, and signature of that witness thereon be marked as Ext.-5/1. He examined available witnesses and recorded their statements u/s 161 Cr.P.C. Sumitra Barman is the victim of this case and I examined her u/s 161 Cr.P.C. After going through the written complaint at also sent her for her medical examination and collected the report of the examination. He also sent the victim for recording her statement u/s 164 Cr.P.C by the Magistrate and it was recorded and he also collected that statement. He sent the accused for his potency test. Accused surrendered before the court. After completion of investigation he submitted C/S being No.144/09, dt.15.5.09. u/s 448/376/812 I.P.C against the accused person.

He examined witness Bipin Barman (P.W.3) and he stated to him that Shyamol Barman finding victim lady alone in her room, entered into her room and then caught hold of her and then forcibly committed rape on her and then he fled away from the house.

He examined PW-4 Maloti Barman and she stated to him that Shyamol Barman(accused) finding the victim lady alone at her room, entered into her room and caught hold of her and forcibly committed rape on her.

xxii. In his cross-examination PW-12 stated that he did not make Jagadish Barman as a witness in the charge sheet. Going through the F.I.R he find that it was a matter of u/s 376/511 I.P.C and the case was initiated also u/8375/511 I.P.C. He separately recorded statement of victim lady u/s 161 I.P.C but during that time she stated to him that she was raped by the accused. He recorded her 161 statement on 16.3.09. F.I.R was received on 16.3.09. He did not file any prayer before the Magistrate for adding section u/s 376 I.P.C. The alleged P.O is the house of the victim lady. He did not seize any kerosene lamp from the P.O. He did not seize Saree, petticoat, blouse of that victim lady. In her 161 statement victim lady did not state to him that she offered her wearing apparels to police but police refused to take it. He saw children of victim lady was about 3 years of age but it was not mentioned in the C/D. Victim lady did not state to him that she could not state that she was raped earlier due to fear. She also did not state to him that by mistake she did not mention in the

F.I.R that she was raped but she simply mentioned that it was an attempt of rape.

She also did not state to him that she could not write/that it was on the complaint a case of rape but during the time of filing of the complaint she stated to the police that she had forgotten to mentions in the F.I.R that accused had committed rape on her and at that time police stated to her that as F.I.R was already written that could not be altered further. He did not examine scribe Narendra Nath Roy. Victim lady did not state to him that she stated to the scribe that she was raped by the caused but scribe did not write it. He examined Bipin and Maloti who were the close neighbours of victim lady. He did not examine Mahesh, Bablu and Ajit. He did not examine Galit Barman. House of Mahesh Harman and Gilit Barman were located adjacent to the P.O.

He did not examine any Panchayat Pradhan of that locality.

11. Assailing the evidence of the prosecution witnesses, the elements to constitute the offence under Sections 448/376/511 of the Indian Penal Code could not be proved. There are contradictions, inconsistencies and infirmities in the evidence of the victim. The appellant was not seen to have trespassed the house of the victim who at variations stated the appellant to have knocked on the door of the victim to the exclusion of any eye witness. The knocking on the door would have drawn the attention of independent witnesses. The ingredients to constitute the offence under Section 448 of the Indian Penal Code are absent.

12. The victim conveniently and deliberately stated to have been raped at times as well as to have been subjected to an attempt of rape confounding the entire situation for oblique motive of false implication. The children of the victim were not examined. The husband of the victim having learnt about such a grave incident did not take immediate action against the appellant. The victim herself deposed at variance to her own statements throughout examination-in-chief as well as the cross-examination. Her evidence did not corroborate with her earlier statement before the Investigating Officer.
13. The medical evidence of the doctor did not corroborate with the oral evidence of the victim.
14. The sole testimony of a victim can be acted upon provided the same is reliable, trustworthy and credible. In the instant case, there is no iota of evidence that the appellant was present at the house of the victim for the purpose of ravishing her or even attempting to commit the same.
15. Under the facts and circumstances of the case in absence of proof of commission of the offence by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.
16. In view of the above discussions, the judgment and order dated 29.01.2010 and 30.01.2010 passed by the Learned Additional Sessions Judge, 3rd Fast Track Court, Cooch Behar arising out of Sessions Case No. 169 of 2009 under Sections 448/376/511 of the Indian Penal Code is set aside.
17. Accordingly, CRA 209 of 2010 stands disposed of. Connected application, if there be any, also stands disposed of.
18. There is no order as to costs.

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.)