

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. (DB) 212 of 2023

Khokan Sarkar

-Vs-

State of West Bengal & Anr.

For the Appellant : Ms. Devi Priya Mitra, Adv.

For the State : Mr. Debasish Roy, learned PP
Mr. Sandip Chakraborty, Adv.
Ms. Nahid Ahmed, Adv.

For the de-facto complainant : Mr. Sumanta Ganguly, Adv.

Heard on : 15.04.2024 and 02.05.2024

Judgment on : 02.05.2024

Joymalya Bagchi, J. :-

1. The appellant has assailed the judgment and order dated 04.04.2023, 06.04.2023 and 11.04.2023 passed by the learned Additional District & Sessions Judge, Special Court (POCSO), 2nd Court, Raiganj, Uttar Dinajpur in POCSO No. 23 of 2017 convicting the appellant for commission of offence punishable under Section 376 of the Indian Penal

Code and Section 4 of the POCSO Act and sentencing him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default, to suffer simple imprisonment for three months more. Fine amount, if realised was directed to be paid to the victim (PW 2). Secretary, District Legal Services Authority, Uttar Dinajpur at Raiganj was also directed to pay compensation of Rs.25,000/- to the victim (PW 2).

Prosecution case:-

2. The prosecution case as alleged against the appellant is as follows:- Victim was a 15 year old school student. On the fateful day i.e. 28.06.2017 her mother had gone to work under 100-days Work Scheme. At 6:00 a.m. she dropped her daughter in the house of her aunt. Aunt and her husband had gone out to work in the field. Their son (PW 5) had gone to his shop to sell vegetables. PW 5's wife (PW 6) took her children for tuition. Victim did not go for tuition. As a result the victim was alone in the house. Taking advantage of the situation at 8:00 a.m. the appellant came into the house, undressed the victim and raped her. At that juncture PW 6 returned home and found the victim undressed. Appellant ran away. Mother of the victim and others also came to the spot. Appellant was brought and tied to a mango tree.

3. Written complaint was lodged by the mother of the victim (PW 1) at the police station resulting in registration of Raiganj Police Station Case No. 445 of 2017 dated 18.06.2017 under Sections 448/353 of the Indian Penal Code read with Sections 8/12 of the POCSO Act. It may be relevant

to note in the written complaint mother of the victim had alleged appellant had attempted to rape the victim.

4. Upon conclusion of investigation charge-sheet was filed and charges were framed under Sections 376(2)(i)/506 of the Indian Penal Code and Section 6 of the POCSO Act. Prosecution examined 14 witnesses to prove its case. In conclusion of trial learned trial Judge convicted and sentenced the appellant as aforesaid.

Arguments at the Bar:-

5. Ms. Mitra for the appellant submits prosecution case of forcible rape is improbable. PW 2, the victim stated she had been raped by the appellant earlier. He had also given pills to her to avoid abortion. However, no complaint in this regard had been filed. Learned trial Judge did not believe this portion of the prosecution case. It appears there was free mixing between the victim and the appellant. Allegation of rape is an embellishment to falsely implicate the appellant. No bodily injury on the victim was found. Accordingly, she prays for acquittal.

4. Mr. Chakraborty for the State and Mr. Ganguly for the victim submit the victim (PW 2) unequivocally stated she had been forcibly raped. Her deposition in Court is corroborated by her statement before the Magistrate. Victim is also corroborated by her mother and other relations. Absence of injury, *per se*, is no ground to disbelieve an act of forcible rape on a minor. Age of the victim has also been proved. Accordingly, appeal is liable to be dismissed.

Analysis and findings:-

5. PW 2 is the victim girl and the most vital witness. She deposed on the fateful day she was alone in the house of her aunt. Appellant came inside the house, undressed and raped her. In the meantime her sister-in-law came, saw her undressed and the appellant fled away. After the incident her mother came and lodged complaint. She gave her statement before the Magistrate.

6. From the deposition of the victim it is clear that PW 6, her sister-in-law had come to the house when the incident took place. But PW 6, in her deposition stated when she came to the spot she saw the victim in the room and the appellant was trying to rape her.

7. PW 1, mother of the victim heard the incident and came to the spot. She found her daughter crying. After hearing the incident from her daughter she lodged the complaint. Written complaint lodged by PW 1 has been exhibited. In the written complaint, PW 1 alleged the appellant had attempted to rape the victim. Relying on the deposition of PW 6 and the averments in the FIR, Ms. Mitra contends initially a case of attempt to rape was registered. Subsequently prosecution has embellished its case and alleged rape.

8. In rebuttal Mr. Chakraborty and Mr. Ganguly submit victim was a 15 year old girl. She had been raped and was in tears. Out of shame and fear she did not come out initially with the correct state of affairs.

Subsequently, in her statement before Magistrate she claimed she had been raped.

9. I have given anxious consideration to the rival submissions of the parties in the light of the evidence on record. While the victim and her mother deposed in court that the victim had been raped, written complaint lodged by the mother after consulting the victim is one of attempt to rape. It is also relevant to note PW 6, sister-in-law of the victim who suddenly returned home and saw the incident deposed the victim was undressed and the appellant was attempting to rape her. PW 6 is a relation of the victim and has no reason to screen the appellant. Similarly it belies logic why the mother of the victim (PW 1) would lodge a case of 'attempt to rape' and not of 'rape' when she had consulted her daughter prior to registration of FIR. Trial Court ignored these circumstances and held a self-respecting lady member of a family would not make a humiliating statement of rape against a minor family member. This stance would have found favour with this Court provided the allegation of rape remained within the four corners of the home.

10. Evidence on record particularly that of independent witnesses viz. PWs 8 and 10 show the incident was not only known amongst family members but was also discussed with local people. They intervened and brought the appellant to the spot and tied him to a mango tree. If it is the prosecution case that the act of rape had been discussed in the community at large, it belies logic why out of shame or otherwise the

complaint lodged by the mother, would describe it as an attempt to rape? On the other hand, it is probable that PW 6 had returned home and intervened at the time when the appellant had undressed the victim and was attempting to rape her. The unvarnished truth is reflected in her deposition and also in the FIR lodged immediately after the incident. Needless to mention the FIR had been lodged after consultation with the victim. Thereafter the case was embellished and the victim made a cryptic statement before the Magistrate that she had been raped. Other witnesses also followed suit in court.

11. I am conscious as per Section 29 of the POCSO Act, in a case of penetrative sexual assault on a minor burden shifts upon the appellant to disprove the case. However, foundational facts attracting the presumption need to be established. Once the foundational fact i.e. rape is established the statutory presumption comes into force. Patent improbabilities and/or contradictions with regard to existence or non-existence of the foundational facts cannot be washed away or ignored with reference to the said presumption. In the present case, we note PW 6 who came to the spot at the time of occurrence contradicted the victim and her mother and stated that the appellant had attempted to rape the victim. At the first instance mother of the victim also came out with a case of attempt to rape in the FIR. After lodging the FIR the case was embellished and the victim made a cryptic statement before the Magistrate that she had been raped.

Conclusion:-

12. Under such circumstances, analysis of the aforesaid evidence on record persuades me to hold that the kernel of truth lies in the deposition of PW 6 and the narration made in the first instance at the police station. Prosecution case was subsequently embellished to one of rape. Even if one ignores the embellished version, prosecution has established a case of attempt to rape. Accordingly, I modify the conviction imposed on the appellant and hold that he is guilty of commission of offence punishable under Sections 376/511 of the Indian Penal Code and under Section 18 of the POCSO Act.

13. The appellant has already suffered about seven years of imprisonment. Sentence imposed on him is modified and it is directed that he shall suffer substantive imprisonment for the period already undergone. Fine directed to be paid shall remain unaltered and shall be awarded to the victim, if realised. Compensation awarded to her is upheld.

14. Secretary, District Legal Services Authority, Uttar Dinajpur at Raiganj shall submit report whether the compensation awarded to the victim has been paid to her or not. Report be submitted within one month from date.

15. Appeal is accordingly disposed of.

16. Copy of the judgment along with Lower Court Records be sent down to the trial Court at once for necessary compliance.

17. Urgent Photostat Certified copy of this judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

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